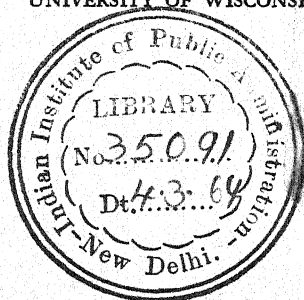

*A Documentary Textbook
in International Law*

A Documentary Textbook.
in
International Law

With Questions and Problems

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To

George Grafton Wilson

and the Comrades of Government 4

Preface

In this book I have made an effort to meet a teaching problem, rather than to attempt to push forward the borders of knowledge in international law. *A Documentary Textbook in International Law* is designed primarily for juniors and seniors in a four-year college or university.

College students approach the study of international law with certain advantages and with certain handicaps. Ordinarily they have had some preparation in history, economics, political science, or sociology; their views are probably broad though somewhat undisciplined; and usually they have had no experience in the close analysis of treaties, cases, or legal documents of any kind. They come to the study of such documents, it seems to me, not so much to find out in detail what is "the law," as to discover and appraise the body of materials described as law and to assess the relative values of various types of such materials. In international law they seek to form a judgment as to the value of such materials for the much larger problem of formulating a pacific international order.

These considerations have influenced the preparation of this book since 1932. Many documents reprinted here, such as the Geneva Protocol, the Rules of the Commission of Jurists for the Regulation of Radio and Aircraft in War, and some of the Harvard Draft Conventions, are not international law but represent a type of aspiration which is the glory of all law. They appear here for this reason.

Again, college students are greatly interested in the machinery of government in their own country which has a special relation to international law. For this reason I have included such materials as those on extradition procedure, instructions to American diplomatic officers, nationality, and other topics, not as international law in the lawyer's sense, but as illustrations of the day-to-day concern of the United States with problems having importance in international law.

In deciding whether to present legislative treaties and draft conventions entire or to split them up in order to illustrate specific legal problems more precisely, I usually reprinted the instrument as a whole, because students at this stage are greatly interested in systematic efforts to deal with cognate

problems. A study of such efforts, even if they are understood not to be law, prepares students more adequately to deal with specialized problems. Again, in deciding whether to reprint a long case with little cutting in order to illustrate a whole problem, or to present short excerpts from a larger number of cases with the idea of capturing "points," I decided in favor of the former procedure. The cases selected, therefore, are long and illustrative rather than brief and analytical. This choice seems justified both by my idea of the role that a college course in international law ought to play, and by the fact that juniors and seniors cannot be expected to brief analytically the number of cases one might demand from second- and third-year men in a law school.

Although many decisions of international tribunals are here reprinted, the decisions of foreign national courts other than the English are sparsely represented. This is because cases decided by national tribunals operating under systems derived from the Roman law are usually so brief and, if I may say so, so "nonhistorical" that they are less effective for teaching than the windy prolixities of American and British judges. International law is historical and does advance by precedent; it therefore does seem valid as a teaching enterprise to present with some completeness the views of international law held by British and American courts, rather than to attempt the difficult task of integrating scattered decisions from many national courts. In fact, such an integration is not necessary to prove the existence of international law. I agree that the collection and analysis of the jurisprudence of national judicial systems on questions of international law comprise one of the most significant projects now challenging workers in the field;¹ but I also believe that this effort has little place in the instruction of college juniors and seniors.

The notes by the editor are designed principally to knit together the documentary materials as briefly as possible; in only a few instances have I deemed my own views of sufficient importance to be presented as such. A reading of these notes will make it obvious that I am indebted to scores of writers in the field, a debt which is acknowledged in many particulars in the footnotes but which it is impossible to acknowledge adequately.

The questions and problems are a device with which I became acquainted in "Government 4" at Harvard and which I have found invaluable in my own teaching. They are in part elementary and even banal questions on the contents of the materials presented, but problems are also included whose discussion should produce many a fruitful class hour. Some of them will test the resources of even well-prepared graduate students. I do not expect that all teachers will like all the questions and

¹ See M. O. Hudson, "Twelve Case Books in International Law," 32 *AJIL*. (1938), 447, 455.

problems, but I hope that every teacher will like some of them. The lists of references should help solve the problems; and solving the problems should deepen understanding of materials in the text. No answer book will be prepared.

The most important thing I should like my own students to get from the book^{*} is a feeling for the nature of the materials which go to make up what we call international law. Such a feeling comes from weighing each type of document in a search for its importance and its limitations in building up international law. Juniors and seniors are too likely to concentrate exclusively on the idea that international law embodies rules which are always binding and which must always be observed by all States. Thus they often find their expectations of international law disappointed. But, if rules of international law are presented to them as rules in the course of gradual evolution, testified to by a case or an award here and a multilateral convention there, their expectations need not be disappointed. Indeed some of them may find in the field the same fascination which has existed for men of acuteness and good will in many epochs.

Contributions of the League of Nations system to international law are sufficiently well represented here, I believe, so that some teachers may find the book useful in the field of international relations and organization, especially where international law and organization are taught together. The basic point of view, however, is that of international law. This also explains the considerable attention devoted to problems of war and neutrality. I believe that the relations of war and neutrality are as needful of principles of order as any other set of human relations. That war and neutrality appear less susceptible to the infusion of such principles than do the relations of peace is only a stronger reason why attention should be devoted to the effort.

Finally, I believe that an international law which can hold its head high in a disordered world must make two efforts: it must promote peace among States no less by advocating a constant disposition to and acceptance of peaceful change than by advocating pacific settlement of disputes; and if hostilities come, it must preserve the largest areas of order possible in the relations of participants and nonparticipants. If law is conceived to be capable of governing all the relations in a great society, these two efforts do not seem to me mutually incompatible.

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The late Professor James W. Garner of the University of Illinois converted me to international law. Professor George Grafton Wilson will find here some inadequate reflections of his "Government 4", a course which was also a deeply moving experience, made possible for me by a Carnegie Fellowship in International Law. Professor Chesney Hill, of the University of Missouri, painstakingly read the entire manuscript and offered many suggestions on questions of scope, balance, and detail, most of which have been incorporated to the measurable improvement of the book. Professors Frederic A. Ogg, Grayson Kirk, and Walter Sharp, my colleagues, gave valued help in moments of discouragement. Mr. Felix Nigro, now of the Social Security Board, helped check references, and Professor Andrew Nuquist, now of the University of Vermont, helped with notes on the Declaration of London. Miss Emily Blenis, Department Secretary, did numerous tedious copying jobs.

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L. P.

Madison, Wisconsin
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Table of Contents

	PAGE
PREFACE	vii
TABLE OF CASES REPORTED	xxiii
TABLE OF DOCUMENTS AND WRITINGS REPRINTED AT LENGTH	xxv
A SHORT GENERAL BIBLIOGRAPHY	xxix
ABBREVIATIONS	xxxiii
CHAPTER I. HISTORY AND THEORY OF INTERNATIONAL LAW	3
§ 1. <i>International Law</i> , by E. M. Borchard. From the <i>Encyclopaedia of the Social Sciences</i>	3
§ 2. <i>The Basis of Obligation in Modern International Law</i> , by J. L. Brierly. From <i>The Law of Nations</i> (2nd Ed., 1936)	14
§ 3. <i>Convention on Rights and Duties of States, Montevideo, 1933</i>	17
References	19
Questions and Problems	22
CHAPTER II. NATURE OF INTERNATIONAL LAW	24
§ 4. <i>The Sources of Law Applied by the World Court. Statute, Permanent Court of International Justice, Article 38</i>	24
§ 5. <i>Convention and Custom. The Prometheus</i> . Supreme Court of Hongkong, 1906	25
§ 6. <i>Custom: The Opinions of Writers. The Paquete Habana—The Lola</i> . Supreme Court of the United States, 1900	29
§ 7. <i>Relation of International Law to National (or "Municipal") Law. Mortensen v. Peters</i> . High Court of Justiciary of Scotland, 1906	33
§ 8. <i>The Same. West Rand Central Gold Mining Co., Ltd., v. The King</i> . Great Britain, King's Bench Division, 1905	36
§ 9. <i>The Same. Advisory Opinion, German Settlers in Poland</i> . Permanent Court of International Justice, 1923	40
§ 10. <i>The Same</i> . Note by the Editor	40
References	43
Questions and Problems	44

	PAGE
CHAPTER III. MEMBERS OF THE COMMUNITY OF NATIONS	47
§ 11. <i>Members of the Community of Nations.</i> Note by the Editor	47
§ 12. <i>Members of the League of Nations</i>	50
a. <i>Covenant of the League of Nations, Article I, Annex</i>	50
b. <i>Is the League of Nations a Person in International Law?</i> Note by the Editor	52
§ 13. <i>Status of Great Britain and the Dominions. Report of Inter- Imperial Relations Committee. Imperial Conference of 1926</i>	53
§ 14. <i>Joint Control of Foreign Policy. Pact of Organisation of the Little Entente, 1933</i>	56
§ 15. <i>Unions of States.</i> Note by the Editor	58
§ 16. <i>States under Specific Restriction: Protection of Minorities</i>	60
a. <i>Treaty between the Principal Allied and Associated Powers and Czechoslovakia, 1919</i>	60
b. <i>Protection of Minorities.</i> Note by the Editor	63
§ 17. <i>States under Specific Restriction: Other Cases</i>	64
a. <i>Haiti. Treaty of 1915 between Haiti and the United States</i>	64
b. <i>Haiti, Cuba, Panama, Monaco, Neutralized States.</i> Note by the Editor	64
§ 18. <i>Dependent Communities</i>	66
a. <i>Kelantan. Duff Development Co., Ltd., v. Government of Kelantan. Great Britain, House of Lords, 1924</i>	66
b. <i>Protectorates, Free City of Danzig, Suzerainties, Indian Tribes.</i> Note by the Editor	71
§ 19. <i>Mandates</i>	76
a. <i>Covenant of the League of Nations, Articles 22, 23</i>	76
b. <i>Mandate for Palestine</i>	76
§ 20. <i>Spheres of Influence. Agreement between Great Britain, France, and Italy respecting Abyssinia, 1906</i>	83
References	87
Questions and Problems	90
CHAPTER IV. RECOGNITION	94
A. Recognition as a Policy	94
§ 21. <i>Recognition: Definitions.</i> Note by the Editor	94
§ 22. <i>Recognition Policy of the United States.</i> Address by Secretary of State Stimson, 1931	97
§ 23. <i>Recognition as a Political Act.</i> Note by the Editor	103
§ 24. <i>American Recognition of the Soviet Union. Exchanges of Com- munications, October to November, 1933</i>	104
§ 25. <i>The Same.</i> Note by the Editor	107
§ 26. <i>The Policy of Nonrecognition. Materials Relating to Nonrecog- nition of the State of Affairs in Manchuria.</i> Arranged by Pro- fessor Quincy Wright	107

	PAGE
§ 27. <i>Some Consequences of Nonrecognition. Recommendations of Advisory Committee of the Assembly of the League of Nations, 1933</i>	III
B. Consequences of Recognition and Nonrecognition in the Courts . .	117
§ 28. <i>Suits by and against Recognized and Unrecognized Governments. R. S. F. S. R. v. Cibrario. Court of Appeals of New York, 1923</i>	117
§ 29. <i>The Same. Note by the Editor</i>	122
§ 30. <i>Validity of Acts Performed in the Jurisdiction of Recognized and Unrecognized Governments, before Courts of the Recognizing or Nonrecognizing State. Luther v. Sagor & Company. Great Britain, Court of Appeal, 1921</i>	123
§ 31. <i>The Same. Note by the Editor</i>	130
§ 32. <i>Recognition of Belligerency. Opinion of Law Officers of the Crown, August 14, 1867</i>	134
§ 33. <i>Insurgency. Note by the Editor</i>	137
References	140
Questions and Problems	141
CHAPTER V. NATIONALITY	146
§ 34. <i>Nature of Nationality Questions. Advisory Opinion, Tunis-Morocco Nationality Decrees. Permanent Court of International Justice, 1923</i>	146
§ 35. <i>Nationality, Jus Soli, Jus Sanguinis. Note by the Editor</i> . . .	153
§ 36. <i>Selections from the Nationality Statutes of the United States</i> .	156
a. <i>Children Born Outside the United States to American Parents</i> .	156
b. <i>Naturalization</i>	157
c. <i>Derivative Naturalization of Minor Children</i>	160
d. <i>Citizenship and Naturalization of Married Women</i>	160
e. <i>Loss of Nationality (Expatriation)</i>	164
f. <i>Loss of Nationality: Expatriation. Note by the Editor</i> . . .	165
§ 37. <i>"Statelessness" or No Nationality. Stoeck v. Public Trustee. Great Britain, Chancery Division, 1921</i>	166
§ 38. <i>The Same. Note by the Editor</i>	173
§ 39. <i>Dual Nationality. United States (Alexander Tellech) v. Austria and Hungary. Tripartite Claims Commission, 1928</i>	175
§ 40. <i>Dual or Multiple Nationality: Liability to Military Service. Note by the Editor</i>	176
§ 41. <i>Effect of Marriage upon Nationality of Women. Note by the Editor</i>	179
§ 42. <i>Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930</i>	182
References	186
Questions and Problems	188

	PAGE
CHAPTER VI. JURISDICTION	193
A. Acquisition of Territory	193
§ 43. <i>Discovery and Occupation. The Island of Palmas (Miangas).</i> Award of the Arbitrator, 1928	193
§ 43a. <i>Prescription. Abandonment.</i> Note by the Editor	203
§ 44. <i>Acquisition by Conquest. Fleming and Marshall v. Page.</i> U. S. Supreme Court, 1850	204
§ 45. <i>Accretion. The Anna.</i> Great Britain, High Court of Admiralty, 1805	206
§ 46. <i>Acquisition by Treaty: Cession. Treaty for the Cession of Lou-</i> <i>isiana, 1803.</i>	208
B. Illustrations of the Relation of Territory to Jurisdiction	212
§ 47. <i>The Territorial Character of Law. American Banana Co. v.</i> <i>United Fruit Co.</i> U. S. Supreme Court, 1909	212
§ 48. <i>Jurisdiction with Respect to Crime. Draft Convention on Juris-</i> <i>isdiction with Respect to Crime.</i> Harvard Law School Research in International Law, 1935	215
§ 49. <i>The Execution of Foreign Judgments: Private International</i> <i>Law ("Conflict of Laws").</i> Note by the Editor	221
C. Certain Geographical Limits to Jurisdiction	222
§ 50. <i>Extent of Territorial Sea. The Legal Status of the Territorial</i> <i>Sea.</i> Annex to Final Act, Conference for the Codification of International Law, 1930	222
§ 51. <i>Hovering and "Hot Pursuit."</i> Note by the Editor	227
§ 52. <i>Bays. Stetson v. United States [The Alleganean].</i> Court of Commissioners of Alabama Claims, 1885	230
§ 53. <i>Boundary Rivers. Arkansas v. Tennessee.</i> U. S. Supreme Court, 1918	237
D. Certain Exceptions from Territorial Jurisdiction	245
§ 54. <i>General. The Schooner Exchange v. M'Faddon.</i> U. S. Su- preme Court, 1812	245
§ 54a. <i>Public Ships. Chung Chi Cheung v. The King.</i> Great Britain, Judicial Committee of the Privy Council, 1938	254
§ 55. <i>State-Owned Ships Engaged in Trade. Berizzi Bros. Co. v. S.S.</i> <i>Pesaro.</i> U. S. Supreme Court, 1926	262
§ 56. <i>Immunity of State-Owned Ships—Immunity of State Agencies</i> <i>Engaged in Trade.</i> Note by the Editor	265
§ 57. <i>Treaty Exceptions from Jurisdiction. The S.S. Wimbledon.</i> Permanent Court of International Justice, 1923	269
§ 58. <i>Servitudes—Jurisdiction over International Rivers.</i> Note by the Editor	277
§ 59. <i>Extraterritoriality.</i> Note by the Editor	280
E. Certain Special Cases	282
§ 60. <i>Foreign Merchantmen in Ports. Wildenhus' Case.</i> U. S. Su- preme Court, 1887	282

§ 61. <i>Merchantmen in Foreign Waters. Regina v. Anderson.</i> England, Court of Criminal Appeal, 1868	280
§ 62. <i>Pirates. In re Piracy Jure Gentium.</i> Great Britain, Judicial Committee of the Privy Council, 1934	290
§ 63. <i>Jurisdiction in the Air Space. Convention Relating to the Regulation of Aerial Navigation,</i> Paris, 1919	300
References	307
Questions and Problems	310
CHAPTER VII. STATE CONTINUITY AND SUCCESSION	318
§ 64. <i>State Continuity: Change in Form of Government. The Sapphire.</i> U. S. Supreme Court, 1871	318
§ 65. <i>Continuing State Identity and Succession to Treaties: Case of Federation. Terlinden v. Ames.</i> U. S. Supreme Court, 1902	320
§ 66. <i>State Continuity and Succession.</i> Note by the Editor	326
§ 67. <i>Succession to Contracts (Debt): Case of Partition. Treaty of Peace with Austria, 1919. Articles 203, 204</i>	328
§ 68. <i>Succession to Contracts (Debt): Case of Unsuccessful Revolt. Opinion of Law Officer of the Crown, February 13, 1867</i>	331
*§ 69. <i>Succession to State Contracts (including Contracts of Debt)—Germany and the Austrian Debts, 1938-1939.</i> Note by the Editor	335
§ 70. <i>Responsibility of Conquering State for Prewar Wrong (Tort) of Conquered State. West Rand Central Gold Mining Co. v. The King.</i> Great Britain, King's Bench Division, 1905	337
§ 71. <i>State Wrongs (Torts).</i> Note by the Editor	338
§ 72. <i>Persistence of Local Law and Private Rights. Advisory Opinion, German Settlers in Poland.</i> Permanent Court of International Justice, 1923	338
§ 73. <i>Persistence of Local Law, Local Public Rights, and Private Rights.</i> Note by the Editor	343
References	344
Questions and Problems	346
CHAPTER VIII. STATE RESPONSIBILITY	351
§ 74. <i>Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners. Draft Convention,</i> Harvard Law School Research in International Law, 1929	351
§ 75. <i>Some General Principles of State Responsibility.</i> Note by the Editor	355
§ 76. <i>Direct and Indirect Responsibility: Denial of Justice. U. S. (B. E. Chattin) v. United Mexican States.</i> U. S.-Mexico, General Claims Commission, 1927	359
§ 77. <i>State Contracts: The "Calvo Clause." U. S. (North American Dredging Co.) v. United Mexican States.</i> U. S.-Mexico, General Claims Commission, 1926	369

	PAGE
§ 78. <i>State Contracts: Responsibility for Payment of "Gold Clause" Loans Held by Foreigners. Case Concerning the Payment of Various Serbian Loans Issued in France.</i> Permanent Court of International Justice, 1929	379
§ 79. <i>Mob Violence: The Bremen Incident</i>	391
a. <i>Incident of July 29, 1935</i>	392
b. <i>The Brodsky Incident</i>	394
References	394
Questions and Problems	396
 CHAPTER IX. STATE AGENTS, DIPLOMATIC AND CONSULAR	 403
A. Diplomatic Agents	403
§ 80. <i>General: American Convention on Diplomatic Officers.</i> Havana, 1928	403
§ 81. <i>Instructions to American Diplomatic Officers, 1927</i>	409
§ 82. <i>Statutory Immunity of Diplomatic Officers in the United States</i>	421
a. <i>Act of April 30, 1790</i>	421
b. <i>Joint Resolution of February 15, 1938</i>	422
§ 83. <i>Diplomatic Immunity: Civil. Magdalena Steam Navigation Co. v. Martin.</i> England, Court of Queen's Bench, 1859	423
§ 84. <i>Cases on Diplomatic Immunity.</i> Note by the Editor	426
§ 85. <i>Distinction between Diplomatic and Consular Immunities.</i> In re Baiz. U. S. Supreme Court, 1890	428
B. Consular Agents	435
§ 86. <i>Status and Functions of Consuls.</i> Note by the Editor	435
§ 87. <i>Treaty Basis of Consular Status and Functions. Treaty, U. S.-Germany, 1923, Articles XVII-XXX</i>	438
§ 88. <i>Consular Immunity: Criminal. Bigelow v. Princess Zizianoff.</i> France, Court of Appeal of Paris, 1928	444
References	451
Questions and Problems	453
 CHAPTER X. INTERNATIONAL AGREEMENTS	 459
§ 89. <i>Treaties: General. Convention on Treaties.</i> Havana, 1928	459
§ 90. <i>Duress.</i> Note by the Editor	464
§ 91. <i>Are Treaties Made by Constitutionally Incompetent Authorities Internationally Binding?—Agreement Making in the United States.</i> Note by the Editor	466
§ 92. <i>Treaties and Acts of Congress. Whitney v. Robertson.</i> U. S. Supreme Court, 1888	470
§ 93. <i>When Does a Treaty Come into Force Internally? Haver v. Yaker.</i> U. S. Supreme Court, 1869	474
§ 94. <i>The Same.</i> Note by the Editor	476

§ 95. <i>Canons of Interpretation of Treaties</i> . Text of the Seventh International Conference of American States, 1933	477
§ 96. <i>Termination of Treaties</i> . <i>Terlinden v. Ames</i> . U. S. Supreme Court, 1902	479
§ 97. <i>The Same, Continued</i> . <i>Charlton v. Kelly</i> . U. S. Supreme Court, 1913	479
§ 98. <i>Effect of War on Treaties</i> . <i>Techt v. Hughes</i> . Court of Appeals of New York, 1920	482
§ 99. <i>Reconsideration of Treaties</i>	483
a. <i>Covenant of the League of Nations, Article 19</i>	483
b. <i>Actions of League Organs</i> . Note by the Editor	483
§ 100. <i>Multilateral Treaties as International Legislation</i> . <i>International Legislation</i> , by Manley O. Hudson. From <i>Encyclopedia of the Social Sciences</i>	484
References	488
Questions and Problems	491
CHAPTER XI. EXTRADITION	494
§ 101. <i>The Basis of Extradition</i> . Note by the Editor	494
§ 102. <i>An Extradition Treaty</i> . U. S.-Great Britain, 1931	496
§ 103. <i>Interstate Rendition</i> . Note by the Editor	501
§ 104. <i>Extradition Procedure: Fugitives Apprehended in the United States</i> . U. S. Code. Title 18, Ch. 20	502
§ 105. <i>The Same: Fugitives Believed to Be Within the Jurisdiction of Foreign States</i> . Memorandum, U. S. Department of State, 1921	503
§ 106. <i>The Principle of Strict Construction—Extradition of Nationals</i> . Note by the Editor	507
§ 107. <i>The Rule of Double Criminality</i> . <i>Factor v. Laubenheimer</i> , U. S. Supreme Court, 1933	509
§ 108. <i>The Same. The Insull Case</i> . Greek Court of Appeals, 1933	519
§ 109. <i>The Same</i> . Note by the Editor	530
§ 110. <i>Political Offenses. In re Castioni</i> . Great Britain, Queen's Bench Division, 1890	534
§ 111. <i>The Same</i> . Note by the Editor	537
References	540
Questions and Problems	541
CHAPTER XII. PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES	545
§ 112. <i>Methods of Pacific Settlement</i> . Note by the Editor	545
§ 113. <i>The Obligation to Settle Disputes by Pacific Means. General Treaty for the Renunciation of War (The "Kellogg Pact")</i> , 1928	548
§ 114. <i>The Hague Convention of 1907 for the Pacific Settlement of International Disputes</i>	550

	PAGE
§ 115. <i>Covenant of the League of Nations, 1919</i>	558
§ 116. <i>Statute, Permanent Court of International Justice ("World Court"), 1920, as Amended</i>	570
§ 117. <i>Aspiration at Its Zenith. The "Geneva Protocol" for the Pacific Settlement of International Disputes, 1924</i>	584
§ 118. <i>The General Act of Arbitration. Note by the Editor</i>	593
§ 119. <i>A Conciliation Obligation of the United States: "Kellogg" Conciliation Treaty. Treaty of Conciliation, U. S.-Poland, 1928</i>	594
§ 120. <i>United States Conciliation Treaties. Note by the Editor</i>	595
§ 121. <i>An Arbitration Obligation of the United States: "Kellogg" Arbitration Treaty. Treaty of Arbitration, U. S.-Poland, 1928</i>	598
§ 122. <i>United States Arbitration Treaties—Other Obligations of Pacific Settlement. Note by the Editor</i>	599
§ 123. <i>Table Showing Status of Some Important Obligations of Pacific Settlement (as of August, 1939)</i>	602
References	610
Questions and Problems	612
 CHAPTER XIII. MEASURES OF REDRESS SHORT OF WAR	 623
§ 124. <i>Measures of Redress Short of War. Note by the Editor</i>	623
§ 125. <i>Embargo. The Boedes Lust. High Court of Admiralty of England, 1804</i>	627
§ 126. <i>Reprisals. Gray, Administrator, v. The United States. U. S. Court of Claims, 1886</i>	630
§ 127. <i>Reprisals—Display of Force—Pacific Blockade. Note by the Editor</i>	637
§ 128. <i>Armed Intervention without War: United States in Haiti, 1915. Materials as arranged by A. C. Millspaugh</i>	640
§ 129. <i>The Same. Note by the Editor</i>	652
§ 130. <i>Self-Defense. Japanese Argument Concerning Manchukuo, 1933. The Incident of September 18</i>	655
§ 131. <i>Limitation of Employment of Force in the Collection of Contract Debts. Hague Convention (II) of 1907</i>	661
§ 132. <i>Calvo and Drago Doctrines. Note by the Editor</i>	662
§ 133. <i>Sanctions under the League Covenant. Article 16, Covenant of the League of Nations</i>	662
§ 134. <i>The Same. Resolutions Concerning the Economic Weapon, League of Nations Assembly, 1921</i>	663
§ 135. <i>The Same. Report by the Secretary-General on the Legal Position Arising from the Enforcement in Time of Peace of the Measures of Economic Pressure Indicated in Article 16, 1927</i>	665
§ 136. <i>The Same. Co-ordination of Measures under Article 16 of the Covenant, Italo-Ethiopian Controversy</i>	674

	PAGE
§ 137. <i>The Same. Termination of Sanctions. Report Adopted by the Assembly of the League of Nations, 1936</i>	683
References	684
Questions and Problems	685
CHAPTER XIV. THE COMMENCEMENT AND THE TERMINATION OF WAR	691
§ 138. <i>War a Bilateral Relation. List of Wars Commencing 1914-1918. From Garner's International Law and the World War</i>	691
§ 139. <i>The Older Law in General: Commencement of Civil War. The Prize Cases. U. S. Supreme Court, 1862</i>	693
§ 140. <i>The Hague Requirement of Declaration. Hague Convention (III) of 1907, Relative to the Opening of Hostilities</i>	699
§ 141. <i>The Commencement of War. Note by the Editor</i>	699
§ 141a. <i>The Termination of War. Note by the Editor</i>	704
References	706
Questions and Problems	707
CHAPTER XV. EFFECTS OF WAR ON NORMAL RELATIONS BETWEEN BELLIGERENTS	710
§ 142. <i>Effect of War on Treaties between Belligerents. Techt v. Hughes. Court of Appeals of New York, 1920</i>	710
§ 143. <i>The Same. Note by the Editor</i>	717
§ 144. <i>Status of Enemy Aliens in the Courts. Porter v. Freudenberg. Great Britain, Court of Appeal, 1915</i>	718
§ 145. <i>Suits by Alien Enemies. Note by the Editor</i>	724
§ 146. <i>Property of Enemy Aliens. In re Ferdinand, ex-Tsar of Bulgaria. Great Britain, Court of Appeal, 1920</i>	725
§ 147. <i>The Same. Note by the Editor</i>	730
§ 148. <i>Status of Enemy Merchant Ships at the Outbreak of Hostilities. Hague Convention (VI) of 1907</i>	732
§ 149. <i>The Same. Note by the Editor</i>	733
§ 150. <i>Trading with the Enemy. Kershaw v. Kelsey. Supreme Judicial Court of Massachusetts, 1868</i>	734
§ 151. <i>The Same. Sutherland, Alien Property Custodian v. Mayer. U. S. Supreme Court, 1926</i>	737
§ 152. <i>The Same. Note by the Editor</i>	745
References	746
Questions and Problems	747
CHAPTER XVI. CONDUCT OF HOSTILITIES ON LAND AND IN THE AIR	751
§ 153. <i>The Value of Rules Governing the Conduct of Hostilities. Note by the Editor</i>	751
§ 154. <i>Laws and Customs of War on Land. Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907</i>	754
§ 155. <i>Forbidden Weapons: Expanding Bullets. Hague Declaration (IV, 3) of 1899</i>	768

	PAGE
§ 156. <i>Forbidden Weapons: Gases, Bacteria, and the Like. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925</i>	769
§ 157. <i>Forbidden Weapons: Aerial Projectiles and Explosives. Hague Declaration (XIV) of 1907</i>	771
§ 158. <i>Geneva ("Red Cross") Convention of 1929. Convention for the Amelioration of the Condition of the Wounded and the Sick of Armies in the Field</i>	773
§ 159. <i>Radio and Aircraft in War. General Report of the Commission of Jurists at The Hague, 1923</i>	781
References	799
Questions and Problems	801
 CHAPTER XVII. CONDUCT OF HOSTILITIES AT SEA	 808
§ 160. <i>Naval Bombardment of Coast Towns. Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, 1907</i>	808
§ 161. <i>Submarine Mines. Hague Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, 1907</i>	810
§ 162. <i>The Same. Note by the Editor</i>	811
§ 163. <i>Conversion of Merchant Ships. Hague Convention (VII) Relating to the Conversion of Merchant Ships into War-Ships, 1907</i>	813
§ 164. <i>The Same. Privateering—"Defensive Armament." Note by the Editor</i>	813
§ 165. <i>The Right of Visit and Search. Instructions for the Navy of the United States, 1917</i>	815
§ 166. <i>Liability to Capture. Instructions for the Navy of the United States, 1917</i>	818
§ 167. <i>Restrictions on Naval Captures. Hague Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, 1907</i>	820
§ 168. <i>Submarine Warfare: The Lusitania Correspondence</i>	822
a. <i>American Note to Germany, June 9, 1915</i>	823
b. <i>German Note to United States, July 8, 1915</i>	827
§ 169. <i>The Same. Proposed Modus Vivendi, January 18, 1916. American Note to Great Britain</i>	831
§ 170. <i>The Same. The Rules of 1936. Procès Verbal. London, 1936</i>	834
§ 171. <i>Hospital Ships. Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, 1907</i>	836
§ 172. <i>The Same. Note by the Editor</i>	840
References	842
Questions and Problems	843

	PAGE
CHAPTER XVIII. NEUTRALITY: POLICY AND LAW	847
A. Introduction	847
§ 173. <i>The Nature of Neutrality. "Neutrality,"</i> by Philip C. Jessup. From <i>Encyclopaedia of the Social Sciences</i>	847
§ 174. <i>"Neutrality" as Policy and as Law.</i> Note by the Editor	854
B. Traditional Neutrality	857
§ 175. <i>The Beginning of Neutrality: Acts Forbidden to Inhabitants of a Neutral State. President Wilson's Proclamation of Neu- trality, 1914</i>	857
§ 176. <i>The Obligation to Prevent Use of the Neutral Territory as a Base of Belligerent Operations. The Alabama Claims Award, 1872</i>	863
§ 177. <i>Rights and Duties of Neutrals in Case of War on Land. Hague Convention (V) of 1907</i>	868
§ 178. <i>Rights and Duties of Neutrals in Naval War. Hague Con- vention (XIII) of 1907</i>	871
§ 179. <i>Prizes in Neutral Ports. The S.S. Appam.</i> U. S. Supreme Court, 1917	877
§ 179a. <i>The Nature and Functions of Prize Courts. The Zamora.</i> Judicial Committee of the Privy Council of Great Britain, 1916	884
§ 180. <i>The Declaration of Paris, 1856</i>	890
§ 181. <i>The Unratified Codification of Neutral Rights and Duties of 1909. Declaration of London</i>	892
§ 182. <i>Distinction between Blockade and Contraband: Ulterior Desti- nation. The Peterhoff.</i> U. S. Supreme Court, 1866	911
§ 183. <i>An Example of the Traditional Law of Blockade. The Adula.</i> U. S. Supreme Court, 1900	921
§ 184. <i>An Example of the Traditional Law of Contraband. The Carthage.</i> Award of the Hague Tribunal of Arbitration, 1913	928
§ 185. <i>Ultimate Destination, 1915. The Kim.</i> High Court of Justice of Great Britain	931
§ 186. <i>Retaliation. The Leonora.</i> Great Britain, Judicial Committee of the Privy Council, 1919	941
§ 187. <i>Unneutral Service. The Manouba.</i> Award of the Hague Tri- bunal of Arbitration, 1915	949
C. Policy of States Towards Foreign Civil Wars	953
§ 188. <i>Havana Convention on Duties and Rights of States in the Event of Civil Strife, 1928</i>	953
D. Recent "Neutral Policy" of the United States	955
§ 189. <i>The Recasting of Neutral Policy: Mr. Warren's Proposals. "Troubles of a Neutral,"</i> by Charles Warren. From <i>Foreign Affairs</i> , April, 1934	955
§ 190. <i>Recent Neutral Policies of the United States.</i> Note by the Editor	970

	PAGE
§ 191. <i>The Same. "Neutrality Act" of 1939. Joint Resolution Ap- proved November 4, 1939</i>	986
§ 192. <i>The Same. The "Fallacies of Neutrality," by L. H. Woolsey, with Interpolations by the Editor</i>	997
References	1000
Questions and Problems	1003
INDEX	1015

Table of Cases Reported

(Cases decided in international tribunals are listed in small capitals. Other cases were decided in national courts. For short excerpts and citations in Notes by the Editor, see Index.)

	PAGE
<i>Adula, The</i>	921
ALABAMA CLAIMS AWARD	863
<i>American Banana Co. v. United Fruit Co.</i>	212
<i>Anna, The</i>	206
<i>Appam, The</i>	877
<i>Arkansas v. Tennessee</i>	237
<i>Baiz, In re</i>	428
<i>Berizzi Brothers Co. v. S.S. Pesaro</i>	262
<i>Bigelow v. Princess Zizianoff</i>	444
<i>Boedes Lust, The</i>	627
"CARTHAGE," THE	928
<i>Castioni, In re</i>	534
<i>Charlton v. Kelly</i>	479
<i>Chung Chi Cheung v. The King</i>	254
<i>Duff Development Co., Ltd., v. Government of Kelantan</i>	66
<i>Exchange, The v. M'Faddon</i>	245
<i>Factor v. Laubenheimer</i>	509
<i>Ferdinand, Ex-Tsar of Bulgaria, In re</i>	725
<i>Fleming and Marshall v. Page</i>	204
GERMAN SETTLERS IN POLAND	339
<i>Gray, Administrator, v. U. S.</i>	630
<i>Haver v. Yaker</i>	474
<i>Insull, Samuel, Extradition of</i>	519
ISLAND OF PALMAS (MIANGAS)	194
<i>Kershaw v. Kelsey</i>	734
<i>Kim, The</i>	931
<i>Leonora, The</i>	941
<i>Luther v. Sagor & Company</i>	123
<i>Magdalena Steam Navigation Co. v. Martin</i>	423
"MANOUBA," THE	949
<i>Mortensen v. Peters</i>	33
<i>Paquete Habana, The</i>	29
<i>Peterhoff, The</i>	911
<i>Piracy Jure Gentium, In re</i>	290

	PAGE
<i>Porter v. Freudenberg</i>	718
<i>Prize Cases</i>	693
<i>Prometheus, The</i>	25
<i>Regina v. Anderson</i>	286
<i>Russian Socialist Federated Soviet Republic v. Cibrario</i>	117
<i>Sapphire, The</i>	318
SERBIAN LOANS ISSUED IN FRANCE	379
STETSON V. UNITED STATES	231
<i>Stoeck v. Public Trustee</i>	166
<i>Sutherland v. Mayer</i>	737
<i>Techt v. Hughes</i>	710
<i>Terlinden v. Ames</i>	320
TUNIS-MOROCCO NATIONALITY DECREES	146
U. S. (CHATTIN) V. UNITED MEXICAN STATES	359
U. S. (NORTH AMERICAN DREDGING CO.) V. UNITED MEXICAN STATES	369
U. S. (TELLECH) V. AUSTRIA AND HUNGARY	175
<i>West Rand Central Gold Mining Co. v. The King</i>	36
<i>Whitney v. Robertson</i>	470
<i>Wildenhus' Case</i>	282
"WIMBLEDON," THE S.S.	269
<i>Zamora, The</i>	884

Table of Documents and Writings

Reprinted at Length

(For short excerpts and references to Notes by the Editor see Index)

MULTILATERAL CONVENTIONS

	PAGE
Agreement between Great Britain, France, and Italy Respecting Abyssinia, 1906	84
Aerial Navigation, Convention Relating to the Regulation of, 1919	300
Amelioration of the Condition of the Wounded and the Sick of Armies in the Field, Convention for the, Geneva, 1929	773
Conflict of Nationality Laws, Convention on Certain Questions Relating to the, The Hague, 1930	183
Declaration of London, 1909	894
Declaration of Paris, 1856	891
Hague Conventions and Declarations:	
Convention (I) of 1907 for the Pacific Settlement of International Disputes	550
Convention (II) of 1907, Respecting the Limitation of Employment of Force for the Recovery of Contract Debts	661
Convention (III) of 1907, Relative to the Opening of Hostilities	699
Convention (IV) of 1907, Respecting the Laws and Customs of War on Land	754
Convention (V) of 1907, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land	868
Convention (VI) of 1907, Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities	732
Convention (VII) of 1907, Relating to the Conversion of Merchant Ships into War-Ships	813
Convention (VIII) of 1907, Relative to the Laying of Automatic Submarine Contact Mines	810
Convention (IX) of 1907, Concerning Bombardment by Naval Forces in Time of War	808
Convention (X) of 1907, for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention	836
Convention (XI) of 1907, Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War	820

	PAGE
Convention (XIII) of 1907, Concerning the Rights and Duties of Neutral Powers in Naval War	871
Declaration (IV, 3) of 1899, Concerning Expanding Bullets	763
Declaration (XIV) of 1907, Prohibiting the Discharge of Projectiles and Explosives from Balloons	771
International Conferences of American States: Conventions, etc.:	
Convention on Diplomatic Officers, Havana, 1928	403
Convention on Rights and Duties of States, Montevideo, 1933	18
Convention on Duties and Rights of States in the Event of Civil Strife, Havana, 1928	954
Convention on Treaties, Havana, 1928	459
Text on the Interpretation of Treaties, 1933	477
Little Entente, Pact of Organisation, 1933	56
Minorities Treaty, Allied Powers and Czechoslovakia, 1919	60
Permanent Court of International Justice, Statute	571
Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Protocol for the, Geneva, 1925	769
Renunciation of War, General Treaty for the, 1928	549
Rules of Submarine Warfare, Procès Verbal Relating to, London, 1936	834
Treaty of Peace with Austria, 1919, Articles 203, 204	329

LEAGUE OF NATIONS TEXTS

Covenant of the League of Nations	559
Article 19 of the Covenant, Assembly Resolution on, 1925	483
Article 19 of the Covenant, Report of Committee of Jurists on, 1921	483
Co-ordination of Measures under Article 16 of the Covenant, Italo-Ethiopian Controversy, Co-ordination Committee, 1935	675
Economic Weapon, Assembly Resolutions Concerning the, 1921	663
Measures in Support of Article 16 of the Covenant, Report by the Secretary-General on, 1927	665
Mandate for Palestine, 1922	76
Nonrecognition, Recommendations of Advisory Committee of the League of Nations Assembly on, 1933	111
Termination of Sanctions, Assembly Report Recommending the, 1936	683

BILATERAL CONVENTIONS

United States-France, Treaty for Cession of Louisiana, 1803	208
United States-Germany, Treaty of December 23, 1923, Articles XVII-XXX. [Consular Officers]	438
United States-Great Britain, Treaty of Extradition, 1931	496
United States-Haiti, Treaty of 1915	647
United States-Poland, Treaty of Arbitration, 1928	598
United States-Poland, Treaty of Conciliation, 1928	594

DIPLOMATIC CORRESPONDENCE

	PAGE
U. S.-Germany. <i>Bremen</i> Correspondence, 1935	392
U. S.-Germany. <i>Lusitania</i> Correspondence, 1915 (excerpts)	823
U. S.-Japan. Nonrecognition of the State of Affairs in Manchuria, 1932 (excerpts)	108
U. S.-U. S. S. R. Roosevelt-Litvinoff Exchange of Communications, 1934. [Recognition.]	104

STATUTES AND OFFICIAL TEXTS OF PARTICULAR STATES

Great Britain:

Inter-Imperial Relations Committee, Imperial Conference of 1926, Re- port of	52
Opinion of Law Officers of the Crown, August 14, 1867. [Recognition of Belligerency.]	135
Opinion of Sir Robert Phillimore, Law Officer of the Crown, February 13, 1867. [Succession to Contracts (Debt): Case of Unsuccessful Revolt.]	331

Japan:

Japanese Delegation to the League of Nations, 1933. Self-Defense in Manchukuo, 1931	656
--	-----

United States:

Statutes:

Act of April 30, 1790. [Diplomatic Immunity.]	421
Act of February 15, 1938. [Protection of Diplomatic Officers and Premises.]	422
Code of the Laws (1935) Title 18, Ch. 20 (extracts). [Extradition Procedure.]	502
Nationality Laws (extracts)	156
"Neutrality Act," November 4, 1939	986

Executive Text:

Neutrality, Proclamation of, by President Wilson, 1914	857
--	-----

State Department:

Address by Secretary of State Stimson, February 6, 1931	98
Instructions to Diplomatic Officers of the United States, March 8, 1927	409
Memorandum Relative to Applications for the Extradition from For- eign Countries of Fugitives from Justice, September, 1921	504

Navy Department:

Instructions for the Navy of the United States, Governing Maritime Warfare, June 1917. [Liability to Capture, Visit and Search.]	815
Intervention in Haiti, Correspondence on, 1915	640

IMPORTANT DRAFT PROJECTS

	PAGE
Commission of Jurists at the Hague, General Report of, 1923. Radio and Aircraft in War	781
Hague Text on The Legal Status of the Territorial Sea, 1930	224
Harvard Law School Research in International Law, Draft Conventions:	
Jurisdiction with Respect to Crime, 1935	217
Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, 1929	351
Protocol for the Pacific Settlement of International Disputes, Geneva, 1924	585

WRITINGS OF INDIVIDUALS

<i>The Basis of Obligation in Modern International Law</i> , by J. L. Brierly . .	14
<i>The Fallacies of Neutrality</i> , by L. H. Woolsey	998
<i>International Law</i> , by Edwin M. Borchard	3
<i>International Legislation</i> , by Manley O. Hudson	484
<i>List of Wars Commencing 1914-1918</i> , by J. W. Garner	691
<i>Methods of Pacific Settlement</i> , from Lauterpacht's Oppenheim . . .	545
<i>Neutrality</i> , by Philip C. Jessup	847
<i>Troubles of a Neutral</i> , by Charles Warren	955

A Short General Bibliography

(Specialized References are listed at the end of each chapter.)

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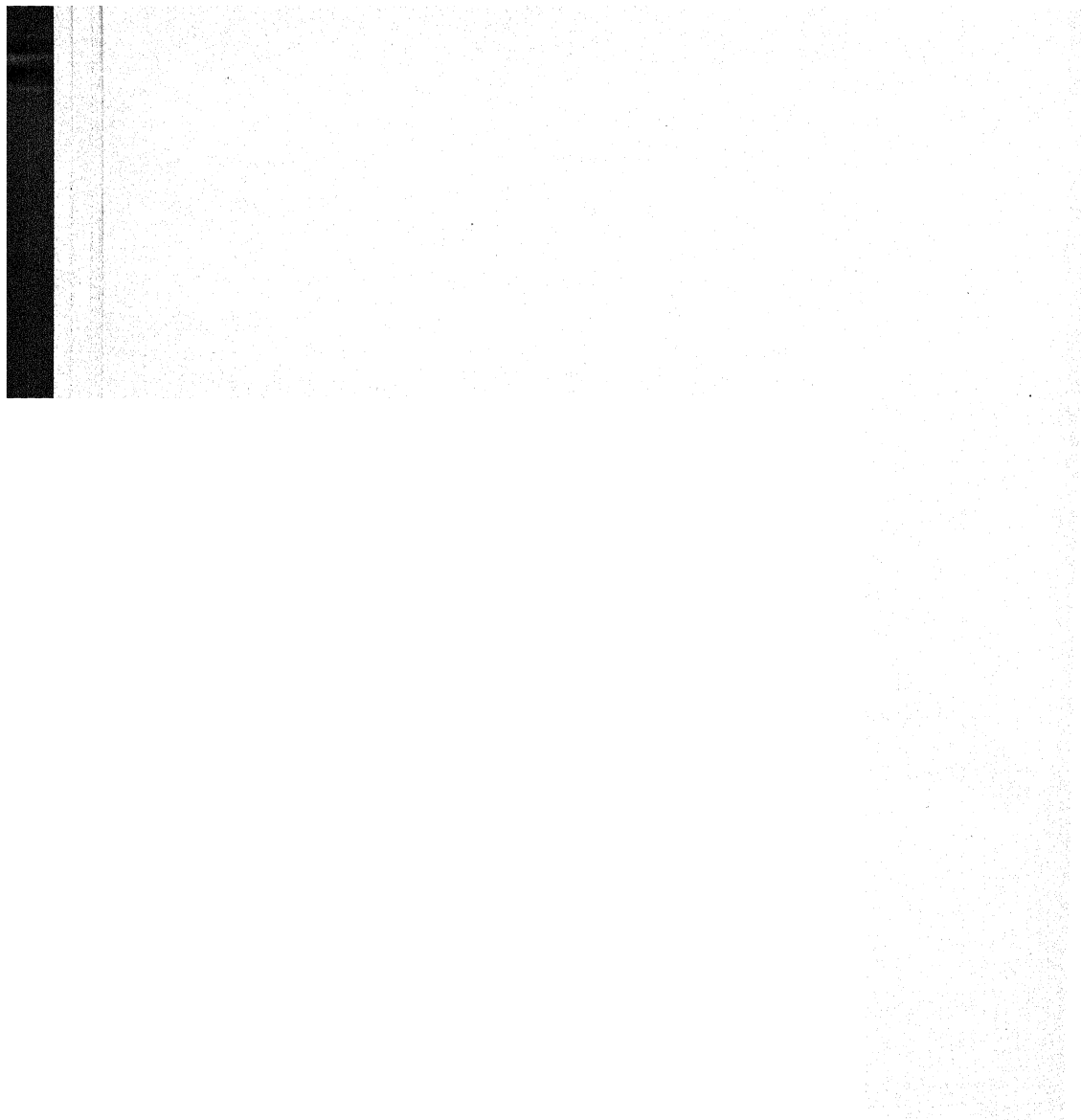
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*A Documentary Textbook
in International Law*

I

History and Theory of International Law

§ 1. INTERNATIONAL LAW

International Law

BY EDWIN M. BORCHARD

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International law is a binding body of rules applied by and to states in their international intercourse. The rules rest partly on the assent of the states and partly on generally approved practise, assent to which is either presumed or, in respect of a particular state declining adherence, immaterial. International law is objective law after it has by time and experience acquired general recognition and application by international tribunals. The term international law seems to have first been used by Bentham, and it has almost entirely replaced the older term, law of nations. ✓

The sources or agencies by which the rules of international law are formulated are either usage, giving rise to custom, or positive agreement or treaties. The difficulty with custom is one of proof. It is often determined only after submission of the issue to adjudication. It is always a troublesome matter to decide at what stage custom can be said to have become authoritative.

The evidences of custom are either documents tending to show what the practise of states had been or the writings of publicists to show general opinion or the decisions of international tribunals and national courts. The documents evidencing practise are treaties between particular states, municipal statutes and decrees, instructions issued by governments prescribing rules for diplomatic and consular officers, opinions of attorneys general and law

officers on international subjects, diplomatic correspondence, the decisions of prize courts and other municipal courts, the history and record of international transactions, including the proceedings of international conferences. The writings of jurists have weight according to the authority of their authors; among the best evidences are the resolutions of the Institute of International Law.

The principal treaties which establish international law are the great law-making treaties, which in so far as they are not merely a declaration of preexisting law are law only for such states as have ratified. Among important treaties are those embodying territorial settlements, so far as they concern the contracting parties, and treaties establishing administrative unions. Distinctions should be made between (1) treaties governing only two or a limited number of contracting parties, (2) general treaties binding a great majority of states and on matters of custom the others by implication and (3) a more or less universal rule of private law common to all or most civilized countries. The suggestion of an "American" international law as distinct from a universal international law, which attracted attention through the writings of Alvarez, is probably without substantial merit; admittedly certain problems are more important to the American continent than to Europe.

The sources of international law are thus more flexible and diverse than those of any municipal system. The method of its growth resembles that of the common law rather than the civil law, for it invokes as authority practise and precedent. The opinions of arbitral tribunals, now some thousands in number, are regarded as of primary authority; but any practise or opinion deemed to have weight may be legitimately used as persuasive evidence. The rules of evidence are not rigid. International law is therefore quite unhampered in its growth by restrictions of method or juristic technique.

Normally international law governs the relations of states. Not much time need be spent on the debate whether individuals are also subjects of international law. The word international would indicate that the rules govern nations. But individuals, pirates, recognized revolutionists, minorities, shippers of contraband, mandated territories, administrative unions, the League of Nations—all these are also the subjects of rights and duties declared by what is called international law. International law is a developing science. A movement is on foot to permit individual foreigners to sue a state under certain circumstances in an international forum, a privilege which would of course depend upon treaty. Is this relation between the individual and a foreign state still international law? Has the concept expanded so as to take in new topics? Was it too narrow in the first place? Are the "new subjects" merely the indirect objects of international law or

are the new fields branches of public law affecting the relations of states with individuals? The answer depends on one's major premise and since it is definitional only is relatively unimportant.

International law constitutes but one aspect of international relations, in many respects not the most vital. The political competition for national aggrandizement, the acquisition or control of territory advanced or backward and of spheres of influence, the struggle for markets and raw materials, the quest for and grant of trade preferences, the height of tariffs and immigration policies, the size of national armies and navies—these factors, which to a large extent determine the economic and political relations of nations, have escaped up to the present time the control of international law. The scope of the subject is therefore limited to the legal and diplomatic relations between states in their treaty and what may somewhat inaccurately be called nonpolitical aspects.

International law is thus concerned with the classification of states according to their degree of independence; their recognition and admission to the international community; the extent of national territory; the limitations upon national jurisdiction; rights upon the high seas and in international channels of communication and transit; the position of agents of the state, such as consuls and diplomatic officers; international ceremonial; extradition; the international responsibility of states to other states for injuries to aliens; the conflicting laws of citizenship; the conclusion, interpretation and termination of treaties; and means of redress for alleged injury, from pacific measures, such as diplomatic representation, mediation and arbitration, to the forcible prosecution of claims and interests leading up to war and including the vast complex of rules governing the relations of belligerents and neutrals in time of war. Within its limited field both in theory and in practise it is supreme, any municipal law to the contrary notwithstanding. Until many departments of state activity denoting political and commercial rivalry and reprisal are brought within its domain, the conduct of international relations cannot be said to be altogether controlled by law.

Aside from recent qualified experiments prohibiting war international law permits war, regarding it as something like a disease but expressing no moral judgment on the merits of the issue. The recognition of the legal rights of neutrals has indeed been regarded as one of the crowning achievements of the nineteenth century. International law recognizes the legal validity of treaties imposed by physical force or duress, a type of contract which probably all civilized systems of private law regard at least as voidable. It recognizes the results of conquest. It permits imperialistic extensions of territory in backward areas and to insure temporary peace accepts inescapable facts. But so long as the gains derived by any nation from a successful

assertion of physical force can secure legal sanction—and this up to the present time has been unavoidable—the system is necessarily somewhat immature.

✓ Inasmuch as international law has been a growth responding to the need for regularized intercourse of states, it is natural to find that its roots go back to antiquity and that its development was influenced by the current learning of its many periods. Its origins lie in the intercourse of the Jews, the Greeks and the Romans with other peoples and it has early exemplification in the distinctions between friendly and enemy peoples, in the conclusion of treaties, in the conduct of war and the making of peace, in the exchange and protection of ambassadors and even in arbitration as developed among the Greek and later among the Italian city-states.

During the Middle Ages with a unitary church and emperor the rules for external intercourse were applied only among the Italian city-states, the Hanseatic towns and the feudal lords. The institution of chivalry came into vogue, but there was little need for interstate law. The Treaty of Verdun of 843 began the process of division in Europe; after the time of Frederick III (1440-93), the last of the emperors to be crowned by the pope, many Christian states arose. Then came the discovery of a New World, the scramble for possessions, the growth of sea trade, the respective claims to dominion over new land areas and over the sea, the break up of the empire, the Reformation, the system of independent states and the Thirty Years' War, which was ended by the Peace of Westphalia in 1648. Modern international law thus began with the rise of the European states system. Some regularized control of the competition arising from the intercourse of a group of so-called independent states became necessary, and the past was laid under contribution to furnish the materials for its ordered management.

Oppenheim lists seven factors before Grotius as preparing the ground for the growth of principles of international law: (1) the civilians, who revived the study of Roman law and furnished to external relations the necessary analogies from private law, and the canonists, who furnished moral and ecclesiastical precepts; (2) the collections of maritime codes after the eighth century for the government of maritime commerce, which in turn nurtured the controversy over the freedom of the seas; (3) the leagues of trading towns for the protection of their trade and their citizens; (4) the custom of sending and receiving permanent legations; (5) the custom of standing armies, beginning in the fifteenth century, which hardened the rules of war; (6) the Renaissance, which revived interest in antiquity and in the philosophical and aesthetic ideals of the Greeks, and the Reformation, which promoted the spiritual influence of the Christian religion; (7) the numerous plans for universal peace.

The principal forerunners of Grotius, commonly called the father of

international law because of his great work, *De jure belli ac pacis*, are Legnano, Vitoria, Soto, Suarez, Ayala, Bodin and Gentilis, all of whom made contributions of note. The importance of Grotius' work lies in the fact that it exerted so profound an influence not only on theory but on practise. Grotius' aim was to bring the practise of nations, especially in war, into conformity with what he called natural justice. He did not define the term. To the customary law developed by the practise of states he conceded obligatory force unless it contravened natural justice. In the peace settlements after many wars of the seventeenth and eighteenth centuries the opinions and doctrines advanced by Grotius and other jurists often found reflection.

Indeed publicists in the seventeenth and eighteenth centuries particularly exerted considerable influence on the development of the rules of law. Contemporary with Grotius was Zouche, who emphasized the customary or voluntary law of nations. The differences in approach gave rise to three different schools of writers: (1) the naturalists, who denied that there was any positive law of nations and declared that the latter is only a part of the law of nature, leading exponents of this school being Pufendorf, Thomasius, Rutherford, Barbeyrac; (2) the positivists, who rely on practise and deny any ethical or "natural" qualification, including in the main Rachel, Textor, Bynkershoek, Moser and G. F. von Martens; (3) the "Grotians," or "Eclectics," standing midway between the naturalists and the positivists, whose principal votaries were Wolff and Vattel. The idea of natural law as the basis of a law of nations was fruitful in a period in which international rights and duties had to be deduced primarily from considerations of human reason and natural justice. The idea of natural law, however, also served as a sanction for the voluntary arrangements established by treaty. It thus prepared the way for the positivism which grew from the increasing reliance upon the treaty formulation of international rights that followed upon the many international wars.

International law after 1648 grew largely in the light of the rules adopted among the major powers in their negotiated treaties of peace or through prize courts and other institutions set up to determine international legal relations. The Peace of Westphalia produced the first great secular European conference and breaking down the theory of the unity of the civilized world opened the way to that conflict of nationalities and states which marks the present era. It inaugurated the conception of the European equilibrium through the balance of power, the guaranty of independence and the admission of Protestant states and republics on a par with Catholic states and monarchies. The wars of conquest of Louis XIV, which kept Europe in turmoil for half the seventeenth century, resulted in five important treaties: Pyrenees (1659), Aix-la-Chapelle (1668), Nijmegen (1678), Ryswick (1697)

and Utrecht (1713). These with other treaties of peace established principles which find their place in the development of international law, such as the right of visit and search of neutral vessels by belligerents, the rule that free ships make free goods—not universally recognized until 1856—the necessity for blockades to be physically effective as a condition of their recognition by neutrals and a general extension of the freedom of the seas. In 1721 Russia entered the councils of Europe as a great power. The eighteenth century was marked by further wars and treaties of peace, which established political doctrines and not a little law. The peaces of Aix-la-Chapelle (1748), Paris (1763) and Versailles (1783) emphasized the principles of the balance of power and rules governing the relations between belligerents and neutrals. The United States now entered the ranks as an independent state and was led by old colonial experiences to espouse vigorously the rights of neutrals, which through the First and Second Armed Neutralities of 1780 and 1800 had already obtained strong support from European powers.

The organization of the Holy Alliance and the fear of its designs for the restoration to monarchy of the Spanish American republics led in 1823 to the Monroe Doctrine, a political principle of self-preservation, and to the doctrines of the recognition of *de facto* governments and nonintervention, which may be said to have become legal principles.

The Peace of Vienna aside from the moderation of its political terms made important legal contributions by extending the doctrine of the neutralization of strategic territories, by stipulating the freedom of navigation in international rivers, by establishing the modern scheme of diplomatic representation and by denouncing the slave trade. At the congress of Aix-la-Chapelle the law of nations was formally recognized as the basis of international relations and the maintenance of the status quo on the basis of legitimacy was posited.

The democratic upheavals of 1848 weakened the principle of legitimacy and gave rise to modern nationalism. Napoleon III developed it as a principle in France, from which it extended to Italy and to Germany; both of these nations were consolidated after wars. At the end of the Crimean War, when Turkey although still under the Capitulations was admitted to the family of nations, the epoch-making Declaration of Paris (*q.v.*) of 1856 was promulgated. It abolished privateering and recognized generally that enemy goods on neutral vessels and neutral goods on enemy vessels are free from capture unless contraband and that blockades to be binding must be effective. Even powers that did not sign the Declaration, like the United States, recognized its validity in practise, and it is now generally regarded as universal law. The period that followed was marked by the growth of conventions for the amelioration of the cruelty of war. During the American Civil War in 1863 Lieber's celebrated *Instructions for the Government of*

Armies of the United States in the Field (United States, Adjutant-General's Office, General Order, no. 100) was issued, and this has since become fundamental for land warfare. In 1864 came the Geneva convention for the amelioration of the condition of the wounded and in 1868 the St. Petersburg convention forbidding the employment in war of explosive shells beyond a certain weight. At Brussels in 1874 came the codification of the rules and usages of land warfare, which although unratified exerted much influence.

The period of political consolidation in Europe was followed after 1874 by the period of dismemberment based on the so-called rights of nationalities, a movement which reached its apotheosis in the treaties of Versailles, St. Germain, Trianon and Neuilly. After the Russo-Turkish War of 1877 the Balkan states were set up and promptly became a source of conflict among the great powers. At the Berlin Congress of 1884 rules were laid down for the more regularized exploitation of Africa. The freedom of commerce, the neutralization of territory in the Congo district, the prohibition of the slave trade, the notification of occupations and the freedom of navigation of certain African rivers were stipulated. After the Sino-Japanese War (1894) and the gradual abolition of extraterritoriality in Japan the latter was admitted as a great power.

The third quarter of the nineteenth century was marked by the establishment of many international administrative unions, such as the International Telegraph Union (1875), Postal Union (1874), Protection of Industrial Property (1883), Copyright (1886) and innumerable others connected with navigation, health, transportation, commerce and labor.

The Hague conferences (*q.v.*) of 1899 and 1907 constitute a landmark in international law in that they codified or revised many of its branches. Their greatest contribution, however, was the adoption of rules of procedure for the arbitration of international disputes. The Permanent Court of Arbitration, before which some twenty cases had come by the end of 1930, was established at The Hague in 1899. The Declaration of London (*q.v.*) of 1909, ratified, however, by only a few powers, confirmed or adopted important rules relating to blockade, contraband, unneutral service, destruction of neutral prizes, transfer from enemy to neutral flag, enemy character, convoy, resistance to visit and search and compensation for breaches. An international prize court proposed at the Hague Conference, 1907, was never established because of inability to agree upon a method of selecting judges. ✓

On the American continent the important Pan-American congresses of 1889, 1901, 1906, 1910, 1923 and 1928 and the Commission of Jurists at Rio de Janeiro of 1925 and 1927 for the codification of law considered or adopted lawmaking conventions on aliens, claims, arbitration, the recognition of new governments, boundaries, jurisdiction, corporations, immigration, diplomatic protection, extradition, freedom of transit, navigation and

aviation, treaties, diplomatic agents, consuls, maritime neutrality, the refusal to recognize the results of conquest and other subjects. A few of these conventions have been ratified by all the states and some by only a few, if any. But they marked a lawmaking trend and are not without importance as evidence of the growth of law. The Inter-American High Commission has fostered the adoption of numerous treaties facilitating trade and commerce. In 1907 a Central American Court of Justice was established, which lasted until 1918.

The twentieth century was moreover marked by four Hague conventions on private international law to facilitate legal recourse between country and country and by a large number of administrative conventions concerning the protection of health, wild life and agriculture and governing various aspects of transportation and communication. An increasing number of treaties embodying the obligation to arbitrate and conciliate disputes, with ever narrowing exceptions, also marked this period. Many of the rights of neutrals were violated by all belligerents during the World War, and a tendency on the part of some of the victors to dispute the validity of well established rules made itself felt.

The war exemplified a new weapon—false propaganda—which poisoned the minds of men and made wise negotiation difficult if not impossible. The Treaty of Versailles and its analogues of 1919 were the result. Through some of the practises sanctioned in that treaty, such as the confiscation of private property and the obligation of the defeated powers to compensate for all damage sustained by civilians regardless of source or wrongfulness, even including pensions, international law has suffered a setback, the extent of which cannot today be measured. But useful new principles were embodied in the treaties providing for the protection of minorities and in the mandates system. To offset the retrogressive tendency there has been a powerful movement in the form of the League of Nations theoretically aiming to make international relations more pacific and systematic and to minimize if not prevent future war.

It is an evidence of realism that in 1923 a conference at The Hague drafted a body of rules governing the use of radio and aircraft in time of war; but these have not been officially adopted as yet by any power. The post-war period has been marked by numerous efforts to consolidate peace, such as the Locarno treaties of 1925 and the Kellogg-Briand Pact of 1928. But they are all based on the preservation of the status quo regardless of its merits. The Kellogg-Briand Pact is also encumbered by exceptions which render its utility doubtful. This peace movement has, however, made progress in the enlargement of the scope of obligatory arbitration of legal disputes at the behest of one of the interested parties only. The Permanent Court of International Justice established in 1920 has rendered over forty

decisions, partly judgments and partly advisory opinions, to the Council of the League.

In 1930 an International Conference for the Codification of International Law was called at The Hague under the auspices of the League of Nations to resolve conflicts of nationality laws and to agree on the rules governing territorial waters and the international responsibility of states arising out of injuries to aliens. The conference drafted a convention dealing with some of the nationality problems but had to record its inability to agree on the other two subjects. Since 1919 there have been numerous financial and political conferences in Europe designed to bring some semblance of order into a disordered world. Many of these have arisen out of the Treaty of Versailles; perhaps the most important has been the series of conferences preparatory to the 1932 disarmament conference called to redeem the pledge of disarmament contained in article 8 of the Covenant. The success of most of these conferences has been limited.

In its juristic theory international law since the days of Grotius has struggled to reconcile its premises with the central realities of the European states system: the tremendous forces of democracy and nationalism. The constant changes in the internal and external organization of states emphasized the difficulties of the basic postulates which had obtained in international law since the Peace of Westphalia. These were contained in the doctrines of the independence and sovereignty of states.

(The theory of sovereignty has impinged on international law in the assumptions that as law is the will of the state no rules of international relations have the force of law except by the consent of the state, and that as the state epitomizes moral values international law has only such validity as the state concedes.) To explain the obvious fact that particular states have often been held bound without their consent and that the moral value of a rule has not been left to any individual state to determine the theory of autolimitation was developed, by which the subjection of the state has been explained as voluntary. But a state which is bound only to the extent that it wishes to be bound is not bound at all, and the experience of a century with international tribunals conclusively negatives any such conclusion. Law must be objective; and once it is recognized as a rule by international tribunals or majority practise, a state can neither refuse obedience nor be the judge of its moral value. A new state entering the community of states is bound immediately by all the rules of the organization. Its consent to any or all the rules is not asked. The assumption of the system is the equality of all states before the law; none can ask exemptions or favors.

If international law is entitled to be characterized as law—a question of definition—it must necessarily limit the omnipotence or sovereignty of the state. Austin was thus more consistent than Jellinek in denying the qualifica-

tion of "law" to international law; for while both proclaim the ultimate sovereignty of the state as the source of law, Austin considers the law of nations as international morality only, whereas Jellinek explains its controlling character as resting solely on the will of the state, on autolimitation. Inasmuch as Austin demands of law that it be declared by a determinate sovereign, international law by definition could not be law to him but only moral precepts presumably not binding on the state when found inconvenient. The Austinians even assume that rules which rest on consent and agreement cannot be law, for only a sense of moral obligation makes them binding—merely another way of saying that they are not legally binding.

The fault is with the major premise. Only new international law derived from international legislation rests on express consent or agreement, and even then probably only for a comparatively restricted period would the unwilling state be able to deny the force of a rule generally accepted. But in the matter of customary international law, which embodies the bulk of the rules, neither complete consent nor agreement of states is necessary. Even Bodin, while an absolutist in the internal aspect of sovereignty, viewed external sovereignty as subject to the law of nations. Unfortunately many of his successors reversed the process; for they appear to regard sovereignty, viewed as a symbol of the state in international relations, as absolutely free from external restraint.

But no state can posit its freedom from the rules of international law. No state so professes. The mere fact that violations of international law occur and occasionally go unredressed is no evidence that the rules violated are not law, any more than the no less frequent violation of municipal law is evidence of its non-legal character. International law is often uncertain; so is municipal law. The sanctions are somewhat different, but they are probably none the less effective and the interpreting agencies none the less active. International courts do not "enforce" international law; neither do municipal courts "enforce" municipal law. But the declaratory and binding decisions of international courts are observed and carried out with a uniformity equal to that prevailing in the case of municipal courts. The agencies for the enforcement of international law are not necessarily courts but other constitutional organs, usually the executive. The weakness of the system, which attracts a disproportionate amount of attention, consists in the inability to compel nations to submit their differences to a court and in the physical power of states, exercised on occasion without regard to law, to constitute themselves plaintiff, judge and sheriff in their own cause.

The World War and the resulting treaties punctured many illusions concerning the origin, causes, conduct, aims and accomplishments of the war. As a result there has arisen in some quarters a cynical contempt for international law. While naked force did override international law in many

respects, mainly in the violation of neutral rights, the remarkable fact that in hundreds of instances international law was observed receives but little publicity.

The horrors of the World War have induced movements to abolish war, and attempts at its regulation have come to be regarded as an unfortunate admission of war's legality. Thus the jurists who take a functional view of international law, who hold that the provision of arbitral machinery should be the chief aim of international law, have looked with disfavor upon the post-war attempts of League agencies to secure its codification even where this codification means the introduction of not a little new law of a progressive character. But the exceptions to the Kellogg-Briand Pact constitute an almost universal admission of the legality of wars of "defense" and of the other wars excepted in the exchange of notes interpreting the obligations of the contracting parties. Thus there has also come a revival of the abstract distinctions made by Grotius and others between "just" and "unjust" wars, the privileges of normal belligerency to be extended to those who conduct the former but not the latter. How the two are to be distinguished and who is to be the judge are questions either left open or to be decided by some League body. Those who would abolish war necessarily would abolish neutrality, which although once regarded as the most advanced stage of international law is frowned upon as unworthy, for war is deemed a crime to which no one can legitimately remain indifferent.

The League Covenant in articles 11 to 16 has sought to render war difficult by invoking the Council whenever war threatens and imposing the penalties of non-intercourse upon the nation which conducts war deemed by the Council to be aggressive. The definition of aggressor while apparently simple in the abstract is almost impossible of application, and unanimity of agreement in time of stress may well prove unachievable. It is probably fantastic to suppose that people having only a remote interest in the status quo can be made to endanger their existence in the pursuit of an abstraction, possibly undesirable. International law will have to go on with all its handicaps until the major nations realize that nationalism and the apparatus of nationalism are inconsistent with and destructive of an ordered world. Whether greater cooperation in regulating common interests, for which the machinery of the League is probably adaptable, can produce a deflation in tariffs, trade restrictions, attempted monopoly of markets and raw materials and other instruments of unfair competition and thus lead to a reduction of armaments and of war psychology and technique is still an unsolved question. That such deflation is essential to a more fruitful organization of the world and for the happiness of its people will hardly be denied. So long as each nation can determine the height of its tariff wall and the size of its armies, there is always danger of war. Reliance must be placed upon recipi-

cal agreements to curb the extreme manifestations of this liberty. The realization of the idea of a superstate—implying a surrender to an international body of control of tariffs, national policies, armaments—which would alter the position of nations to resemble the position of a state in the American union is probably remote. Until that time comes international law must be dealt with as it is; and yet attempts must be made to bring within its range those relations which now escape its control, to close many gaps, to deflate the causes of political competition and war and to persuade the nations to realize that cooperation even at the sacrifice of national self-sufficiency is a wiser and less costly exercise of independence than a recalcitrant insistence upon one's own ambitions regardless of the common welfare.

§ 2. THE BASIS OF OBLIGATION IN MODERN INTERNATIONAL LAW

BY J. L. BRIERLY

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The survival of the theory of sovereignty has had unfortunate effects on international legal theory, for writers on international law have naturally found it difficult to explain how that law can be binding on entities whose essential nature is supposed to place them above law. Two doctrines which attempt to resolve this contradiction may be regarded as in the orthodox tradition of international legal theory.

The doctrine of "fundamental rights" is a corollary of the doctrine of the "state of nature," in which men are supposed to have lived before they formed themselves into political communities or states; for states, not having formed themselves into a super-state, are still supposed by the adherents of this doctrine to be living in such a condition. It teaches that the principles of international law, or the primary principles upon which the others rest, can be deduced from the essential nature of the state. Every state, by the very fact that it is a state, is endowed with certain fundamental, or inherent, or natural, rights. Writers differ in enumerating what these rights are, but generally five rights are claimed, namely, self-preservation, independence, equality, respect, and intercourse. It is obvious that the doctrine of fundamental rights is merely the old doctrine of the natural rights of man transferred to states. That doctrine has played a great part in history; Locke justified the English Revolution by it, and from Locke it passed to the leaders of the American Revolution and became the philosophical basis of the Declaration of Independence. But hardly any political scientist to-day would regard it as a true

philosophy of political relations, and all the objections to it apply with even greater force when it is applied to the relations of states. It implies that men or states, as the case may be, bring with them into society certain primordial rights not derived from their membership of society, but inherent in their personality as individuals, and that out of these rights a legal system is formed; whereas the truth is that a legal right is a meaningless phrase unless we first assume an objective legal system from which it gets its validity. Further, the doctrine implies that the social bond between man and man, or between state and state, is somehow less natural, or less a part of the whole personality, than is the individuality of the man or the state, and that is not true; the only individuals we know are individuals-in-society. It is especially misleading to apply this atomistic view of the nature of the social bond to states. In its application to individual men it has a certain plausibility because it seems to give a philosophical justification to the common feeling that human personality has certain claims on society; and in that way it has played its part in the development of human liberty. But in the society of states the need is not for greater liberty for the individual states, but for a strengthening of the social bond between them, not for the clamant assertion of their rights, but for a more insistent reminder of their obligations towards one another. Finally, the doctrine is really a denial of the possibility of development in international relations; when it asserts that such qualities as independence and equality are inherent in the very nature of states, it overlooks the fact that their attribution to states is merely a stage in an historical process; we know that until modern times states were not regarded either as independent or equal, and we have no right to assume that the process of development has stopped. On the contrary it is not improbable, and it is certainly desirable, that there should be a movement towards the closer interdependence of states, and therefore away from the state of things which this doctrine would stabilize as though it were part of the fixed order of nature.

The doctrine of positivism, on the other hand, teaches that international law is the sum of the rules by which states have *consented* to be bound, and that nothing can be law to which they have not consented. This consent may be given expressly, as in a treaty, or it may be implied by a state acquiescing in a customary rule. But the assumption that international law consists of nothing save what states have consented to is an inadequate account of the system as it can be seen in actual operation, and even if it were a complete account of the contents of the law, it would fail to explain why the law is binding. It is in the first place quite impossible to fit the facts into a consistently consensual theory of the nature of international law. *Implied* consent is not a philosophically sound explanation of customary law, international or municipal; a customary rule is observed, not because it has been consented

it because it is believed to be binding, and whatever may be the explanation or the justification for that belief, its binding force does not depend, and it is even regarded as depending, on the approval of the individual or the state to which it is addressed. Further, in the practical administration of international law states are continually treated as bound by principles which cannot, except by the most strained construction of the facts, be said to have consented to, and it is unreasonable, when we are seeking the true explanation of international rules, to force the facts into a preconceived theory instead of finding a theory which will explain the facts as we have them. For example, a state which has newly come into existence does not in any intelligible sense *consent* to accept international law; it does not regard itself, nor is it not regarded by others, as having any option in the matter. The fact is that states do not regard their international legal relations as resulting from consent, except when the consent is *express*,¹ and that the theory of *implied* consent is a fiction invented by the theorist; only a certain plausibility is given to a consensual explanation of the nature of their obligations by the fact, important indeed to any consideration of the methods by which the law develops, that, in the absence of any international machinery for legislation by majority vote, a *new* rule of law cannot be imposed upon states solely by the will of other states.

But in the second place, even if the theory did not involve a distortion of the facts, it would fail as an explanation. For consent cannot of itself create an obligation; it can do so only within a system of law which declares that consent duly given, as in a treaty or a contract, shall be binding on the parties consenting. To say that the rule *pacta servanda sunt* is itself founded on consent is to argue in a circle. A consistently consensual theory again would have to admit that if consent is withdrawn, the obligation created by it comes to an end. Most positivist writers indeed would not admit this, but they deny it is in effect to fall back on an unacknowledged source of obligation, which, whatever it may be, is not the consent of the state, for that has ceased to exist. Some modern German writers, however, do not shrink from facing the full consequences of the theory of a purely consensual basis for international law; they have inherited from Hegel a doctrine known as the "autodetermination of sovereignty," which teaches that states are sovereign persons, independent of wills which reject all external limitation, and that if we find, as we appear to do in international law, something which limits their wills, this something can only proceed from themselves. Most of these writers admit that a self-imposed limitation is no limitation at all; and they conclude therefore that so-called international law is nothing but "external public law" (*äusseres Staatsrecht*), binding the state only because, and only

¹ Cf. Reeves, *La Communauté internationale*, p. 40, in the *Recueil* of the Hague Academy,

so long as, it consents to be bound. There is no flaw in this argument; the flaw lies in the premises, because these are not derived, as all positivist theory professes to be, from an observation of international facts. The real contribution of positivist theory to international law has been its insistence that the rules of the system are to be ascertained from observation of the practice of states and not from *a priori* deductions, but positivist writers have always been true to their own teaching; and they have been too ready to treat a method of legal reasoning as though it were an explanation of the nature of the law.

There need be no mystery about the source of the obligation to international law. The same problem arises in any system of law and it can never be solved by a merely *juridical* explanation.² The answer must be sought outside the law, and it is for legal philosophy to provide it. The notion that the validity of international law raises some peculiar problem arises from the confusion which the doctrine of sovereignty has introduced into international legal theory. We have accepted a false idea of the state as a personality with a life and a will of its own, still living in a "statist" nature," which is contrasted with the "political" state in which individuals have come to live. This assumed condition of states is the very negation of law, and no ingenuity can explain the coexistence of the two. But this notion is as false analytically as it admittedly is historically. The truth is that states are not persons, however convenient it may often be to personify them; they are merely *institutions*, that is to say, organizations which are established among themselves for securing certain objects, of which the most fundamental is a system of order within which the activities of their common life can be carried on. They have no wills except the wills of the individual human beings who direct their affairs; and they exist not in a political vacuum but in continuous political relations with one another. Their submission to law is as yet imperfect, though it is real as far as it goes; the problem of extending it is one of great practical difficulty, but it is not one of intrinsic impossibility. There are important differences between international law and the law under which individuals live in a state, but those differences do not lie in metaphysics nor in any mystical qualities of an entity called sovereignty.

§ 3. CONVENTION ON RIGHTS AND DUTIES OF STATES MONTEVIDEO, 1933

The Convention reprinted below is an important general treaty statement of the force among ratifying States, of the basic or fundamental rights and duties

² Cf. Triepel, *Droit international et droit interne*, p. 81.

States as persons in international law. Some of its principles are generally accepted, but others are debatable and represent aspirations rather than true international law. Its principles are a good statement of the "natural rights" theory of international law.

United States Treaty Series, No. 881, pp. 1-7.¹

The Governments represented in the Seventh International Conference of American States:

Wishing to conclude a Convention on Rights and Duties of States, have appointed the following Plenipotentiaries:

[Names of the Plenipotentiaries are omitted.]

Who, after having exhibited their Full Powers, which were found to be in good and due order, have agreed upon the following:

ARTICLE 1. The state as a person of international law should possess the following qualifications: *a*) a permanent population; *b*) a defined territory; *c*) government; and *d*) capacity to enter into relations with the other states.

ARTICLE 2. The federal state shall constitute a sole person in the eyes of international law.

ARTICLE 3. The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.

The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.

ARTICLE 4. States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law.

ARTICLE 5. The fundamental rights of states are not susceptible of being affected in any manner whatsoever.

ARTICLE 6. The recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable.

ARTICLE 7. The recognition of a state may be express or tacit. The latter results from any act which implies the intention of recognizing the new state.

¹ Signed at Montevideo, December 26, 1933; ratification of the United States deposited (with reservation) with Pan-American Union, July 13, 1934; proclaimed January 18, 1935. Other States which have ratified are Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua and Panama (as of August, 1939).

ARTICLE 8. No state has the right to intervene in the internal or external affairs of another.

ARTICLE 9. The jurisdiction of states within the limits of national territory applies to all the inhabitants.

Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals.

ARTICLE 10. The primary interest of states is the conservation of peace. Differences of any nature which arise between them should be settled by recognized pacific methods.

ARTICLE 11. The contracting states definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure. The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily.

ARTICLE 12. The present Convention shall not affect obligations previously entered into by the High Contracting Parties by virtue of international agreements.

[Articles 13-16, dealing with ratifications, adhesions, etc., certain reservations, and the names of signatories, are omitted.]

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Notice to Bearers of Passports, issued customarily with each passport, warns passport holders: "Persons born in the United States of unnaturalized parents are American citizens under American law, but they may also be citizens or subjects of the country of their parents' origin under the law of that country. As the legal right of the other country to the allegiance of such persons while within their territory can not be denied by this Government, the Department can offer no assurances to them that any representations which it may make on their behalf will be successful."² The *Convention on Certain Questions Relating to Nationality Laws* provides: "ARTICLE 4. A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses."

A similar principle is applied by arbitration tribunals, which refuse to entertain claims by one State against another on behalf of an individual claimant when the individual is a national of both States under their respective laws. This is illustrated by the *Tellech Case*, § 39 above. In the *Canevaro Case*, decided in 1912 by the Hague Permanent Court of Arbitration as between Italy and Peru, the Tribunal refused to pass judgment on the claim of Rafael Canevaro, who possessed both Italian and Peruvian nationalities.³ In a British case, however, the fact that an individual possessed both British and German nationalities did not protect him from having his property dealt with as that of a "German national" under the Treaty of Peace and the Treaty of Peace Order (see § 37 above). "All that has to be proved . . . is that the person concerned is a German national according to German municipal law. If that fact be proved then the person concerned comes within the operation of the Treaty and Order, although he may also be a national of some other State, even though that State be Great Britain, and even though, according to our law, he would be deemed not to be a German subject." (Italics are the editor's.) The case seems hard, though the Court pointed out that the custodian could release the property "in all proper cases."⁴

Where arbitration tribunals have to decide the effective nationality of a claimant who possesses two nationalities, only one of which is that of a State before the tribunal, the tribunal will examine the question whether the claimant possesses the nationality of the appearing State. If the claimant has the nationality of an appearing State, the claim will be entertained, even if he possesses also the nationality of a State not before the tribunal.⁵

² Issue of 1935, p. 10.

³ Wilson, *Hague Arbitration Cases* (1915), pp. 238, 245.

⁴ *In re Chamberlain's Settlement*, L. R. [1921] 2 Ch. 533.

⁵ See the *Flutie Cases*, United States-Venezuela Arbitration of 1903, *Ralston's Report*, p. 38; the *William Mackenzie Case*, United States-Germany Mixed Claims Commission, 1926, *Decisions and Opinions of the Commission*, p. 628; and the *Case of Baron Frederic de Born*, Hungary-Yugoslavia, Mixed Arbitral Tribunal, 1926, 6 *Recueil des décisions des tribunaux arbitraux mixtes*, p. 501.

States who married aliens should not lose their citizenship by virtue of their marriage, but only by an independent and formal renunciation of citizenship before a court having jurisdiction over the naturalization of aliens.

The difficulty with this attempt to make the nationality of married women independent of that of their husbands was that the legislation of most States provided that when alien women married their nationals, such women unconditionally acquired their husbands' nationality; and the legislation of many States provided that if women of their nationality married aliens, they lost unconditionally the nationality of those States, without reference to whether such women acquired by marriage the husband's nationality under the legislation of the husband's State. Such legislation was based upon the simple principle that the nationality of the wife should follow that of the husband. Combined with the principle that the nationality of minor children followed that of the father, the central idea was clear that different members of the same family should not possess different nationalities. An example of these principles is provided in the British Nationality and Status of Aliens Act, 1914, as amended (4-5 Geo. V, C. 17):

10. The wife of a British subject shall be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien: Provided that, where a man ceases during the continuance of his marriage to be a British subject, it shall be lawful for his wife to make a declaration that she desires to retain British nationality, and thereupon she shall be deemed to remain a British subject, and provided that where an alien is a subject of a state at war with His Majesty it shall be lawful for his wife if she was at birth a British subject to make a declaration that she desires to resume British nationality, and thereupon the Secretary of State, if he is satisfied that it is desirable that she be permitted to do so, may grant her a certificate of naturalization.

11. A woman who, having been a British subject, has by, or in consequence of, her marriage become an alien, shall not, by reason only of the death of her husband, or the dissolution of her marriage, cease to be an alien, and a woman who, having been an alien, has by, or in consequence of, her marriage, become a British subject, shall not, by reason only of the death of her husband or the dissolution of her marriage, cease to be a British subject.

Now, suppose that a woman who is a British subject marries a citizen of the United States. Under the British legislation above, she has lost her British nationality; but if the marriage took place after the enactment of the Cable Act in 1922, she does not become a United States citizen until she has been naturalized independently. During the interval she is stateless, and under the operation of American immigration laws she may be prevented from entering the United States. Many such cases occurred. Again, suppose that a woman who is a United States citizen marries a British subject. Under the British legislation above, she is deemed to be a British subject; but if the

QUESTIONS AND PROBLEMS

1. According to Professor Borchard, what is international law? Is the assent of a particular State necessary to every rule of international law? What is meant by Professor Borchard's statement, "International law is objective law after it has by time and experience acquired general recognition and application by international tribunals"?

2. What are the sources of international law? Do the sources referred to by Professor Borchard differ in any respect from those mentioned in Article 38 of the Statute of the Permanent Court of International Justice (§ 4)? Explain. What are the evidences of the existence of international custom? Can you find examples of each type of such evidence in this book? (See Questions and Problems, Chapter II, for further explanation of what is meant here.)

3. What distinctions does Professor Borchard make as among types of treaties important for international law? Does he think that international law governs the relations between States merely? That international law is the most vital aspect of international relations? With what aspects of international relations is international law, in his judgment, concerned? Would he say that the imposition of a tariff by the United States which completely cut off trade with State X, presented a question of international law? Explain. Under what circumstances might such an act present a question of international law? Is this conception of its scope damaging to your idea of international law?

Compare the list of subjects with which international law is concerned, as stated by Professor Borchard, with the list of chapter headings in this book.

4. Does international law prohibit war? Treaties imposed by force?

5. Describe the origin and growth of international law. When may modern international law be said to have begun? Why? What factors contributed to its development?

What was the importance of Grotius? What was the name of his principal work? Did he have any forerunners? Who was Zouche? What are the differences between the naturalists, the positivists, and the eclecticists?

6. Name some important treaties for the development of international law; some important international administrative unions; some important contributions of the United States to international law. What was the importance of the two Hague conferences? Can you find in this book any of the great lawmaking treaties mentioned by Borchard?

7. What are the "premises of international law" of which Professor Borchard writes? Describe the struggle between the "premises of international law" and the forces of nationalism and democracy.

8. Does the fact that international law is sometimes not observed prove that there is no such law? Did the World War of 1914 terminate international law? Did the Covenant of the League of Nations revolutionize international law?

9. Does Professor Borchard regard international law as a finished product? Can you think of any reason why it should necessarily be regarded as a finished product? What is the significance of your answers to these questions?

10. (§ 2) What is the "fundamental rights" theory of international law? What are the objections to it? What is the doctrine of "positivism"? What are the objections to it? What is its contribution? What is the "auto-limitation" theory? What is the objection to it? What is Professor Brierly's explanation of the basis of obligation in international law?

11. What is the nature of the *Convention on Rights and Duties of States* (§ 3)? Have states ratified it? Do you think it is international law?

Under the *NOTIONS* of the Convention, is Texas a "state as a person of international law"? What are the *PROCESSES*? The United States? What are the determining factors?

Under the Convention, did the political existence of Soviet Russia depend upon its recognition by the United States? What rights did Soviet Russia have prior to such recognition? Were there any limitations upon these rights?

What is the meaning of Article 4? Does it mean that Germany and Belgium are equal in battle? Before an arbitration tribunal? Could Germany claim greater rights under international law than Belgium, because of Germany's greater power and resources? (See materials in Chapter III.)

Under the principles of the Convention, could the United States withdraw its recognition of Nazi Germany? What is the significance of the present recognition by the United States of Nazi Germany? Does it mean that the United States approves the present German Government? (See materials on recognition in Chapter IV.)

Compare Article 8 with the materials in §§ 124-30 below. What are your conclusions?

Compare Article 10 with § 113 below. What are your conclusions?

Compare Article 11 with §§ 26, 27 below, and also with §§ 133-37 below. What are your conclusions?

(c) C was born in Germany in 1936. His mother is an American citizen who married his father, a Germany national, in 1935.

(d) D was born in Germany in 1920. His mother is an American citizen who married his father, a German national, in 1915.

(e) Mrs. E, born in Denmark, emigrated to the United States when five years old. Her parents were never American citizens. She married a Danish national in the United States in 1915, and Mr. E took out his first papers in 1917. In 1919 Mrs. E obtained a divorce, before Mr. E took out second papers. Mrs. E never became naturalized independently. She has resided in the United States sixty-five years.

(f) Mrs. F was born in Wisconsin. In 1920 she married a British subject, who died in 1925. Would it make any difference as to Mrs. F's nationality if the marriage had occurred in 1927? 1936?

(g) G is the grandson of Chinese grandparents, both of whom were born in the United States, and returned to China shortly after G's birth. Neither they nor G's parents subsequently resided in the United States.

(h) H, born in Switzerland, was naturalized in the United States in 1910. In 1915 he returned to Switzerland, where he remained for ten years without returning to the United States.

(i) I, born in the United States, is naturalized as a Russian citizen.

4. What is "the right of expatriation"? What is the attitude of the United States on this problem, as embodied in its legislation? Is this attitude generally shared? Does United States legislation require that Russian nationals must either receive the consent of Russia or complete their Russian military obligations before they can become naturalized as United States citizens? Does Russian legislation require this? Answer the same questions with respect to Japanese nationals. Where a foreign State requires that its nationality cannot be lost without its consent, does this mean that the United States authorities cannot proceed to naturalize the nationals of such a State? What are your conclusions about this? What are the provisions of the *Convention on Certain Questions Relating to the Conflict of Nationality Laws* (§ 42) on this point? Do they settle the question for the United States?

5. Compare the role played by national courts with that played by international tribunals, in determining questions of nationality.

6. What was the precise question before the court in *Stoeck v. Public Trustee* (§ 37)? How was it decided? Why was the court concerned with the nationality of Stoeck? Was its concern the same as that of an arbitration tribunal called upon to determine the nationality of an individual? Explain. What sort of evidence did the court deem as conclusive with respect to Stoeck's nationality? What cases did it distinguish from Stoeck's case, and why? Did the court give any examples of how the status of a stateless person might arise?

7. What is statelessness? Is it the same thing as the denial of diplomatic protection? What are its disadvantages? Do you think it might in some respects be advantageous to be a stateless person? What were the provisions of the *Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws* (§ 42) with respect to statelessness? Of the *Protocol Relating to a Special Case of Statelessness* (§ 38)? Of the *Special Protocol Concerning Statelessness* (§ 38)? Can you think of cases of statelessness which would not be covered by any of these instruments?

Although municipal law, thanks to its complete judicial system, is able to recognize abstract rights of property as existing apart from any material display of them, it has none the less limited their effect by the principles of prescription and the protection of possession. International law, the structure of which is not based on any super-state organization, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations.

The principle that continuous and peaceful display of the functions of state within a given region is a constituent element of territorial sovereignty is not only based on the conditions of the formation of independent states and their boundaries (as shown by the experience of political history) as well as on an international jurisprudence and doctrine widely accepted; this principle has further been recognized in more than one federal state, where a jurisdiction is established in order to apply, as need arises, rules of international law to the interstate relations of the states members. This is the more significant, in that it might well be conceived that in a federal state possessing a complete judicial system for interstate matters—far more than in the domain of international relations properly so-called—there should be applied to territorial questions the principle that, failing any specific provision of law to the contrary, a *jus in re* once lawfully acquired shall prevail over *de facto* possession however well established.

It may suffice to quote among several non-dissimilar decisions of the Supreme Court of the United States of America, that in the case of the State of Indiana *v.* State of Kentucky (136 U. S. 479) 1890, where the precedent of the case of Rhode Island *v.* Massachusetts (4 How. 591, 639) is supported by quotations from Vattel and Wheaton, who both admit prescription founded on length of time as a valid and incontestable title.

Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is uncontestably displayed or again regions accessible from, for instance, the high seas. It is true that neighboring states may by convention fix limits to their own sovereignty, even in regions such as the interior of scarcely explored continents where such sovereignty is scarcely manifested, and in this way each may prevent the other from any penetration of its territory. The delimitation of hinterland may also be mentioned in this connection.

If, however, no conventional line of sufficient topographical precision

The question which naturally follows is "What do you mean by the law of nations?" I answer that the law of nations is that system of rules respecting belligerent and neutral rights established by consent among the civilised and commercial nations of the world, partly written and partly arising out of custom and rendered stable by judicial decisions from time to time.

In my opinion, the expression contraband of war has a well-known and accepted meaning among the civilised commercial powers of the world. If that were not so we should not, as we do, find the expression used without definition in solemn treaties between the powers. The expression "contraband of war" is used without any definition of its meaning in the Treaty of Paris of the 16th April, 1856. The inference from that fact is, to my mind, irresistible that there was no definition needed, because the expression had the same definite meaning in the minds of all the plenipotentiaries of the Powers parties to that treaty.

The Treaty of Paris, to which Russia is a party, and to which she still adheres, commences with the following preamble: . . . Then immediately follows this declaration:—"The above-mentioned plenipotentiaries being duly authorised resolved to concert among themselves as to the means of attaining this object; and having come to an agreement have adopted the following solemn Declaration:—

"(1) Privateering is, and remains abolished.

"(2) The neutral flag covers enemy's goods, with the exception of contraband of war.

"(3) Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.

"(4) Blockades in order to be binding, must be effective, that is to say maintained by a force sufficient really to prevent access to the coast of the enemy."

I draw special attention to the fact that the expression "contraband of war" is twice used in this declaration without being in any way defined. This declaration was designed to give effect to the opinion of the plenipotentiaries expressed in the preamble, viz. that it was to the advantage of the civilised world to establish a uniform doctrine on the subject of maritime law in time of war; and with that object in view to introduce certain "fixed principles." At the same sitting of the plenipotentiaries the following resolution was adopted (Protocol No. 24): "On the proposition of Count Walewski, and recognising that it is for the general interest to maintain the indivisibility of the four principles mentioned in the declaration signed this day, the plenipotentiaries agree that the powers which shall have signed it, or which shall have acceded to it, cannot hereafter enter into any arrangement in regard to the application of the right of neutrals in time of war which does not at the same time rest on the four principles which are the object of the said declaration."

It will be observed that by this Protocol the plenipotentiaries of Russia bind that Power not thereafter to adopt any attitude towards neutrals in time of war which does not rest upon the four principles enunciated in the declaration. This Protocol has an important bearing upon the contention at the Bar that Russia as an independent sovereign state possesses, as a concomitant to the right to make war, the right to declare what shall or shall not be considered contraband of war.

I dwell here upon the fact that the expression "contraband of war" occurs twice in the declaration in the Treaty of Paris; that the expressions "privateering" and "blockade" occur each once; and that there is in that declaration no definition of the meaning of any of those expressions. Why was there this omission to define these expressions? Was it not because they each had in the minds of the Plenipotentiaries of the Powers a recognised meaning at the time when the treaty was signed? and because the expression "contraband of war" no more needed definition than the expressions "blockade" or "privateering" did? What then was the meaning which it must fairly be assumed the Plenipotentiaries attached to the expression "contraband of war" as used by them in the Treaty of Paris? It seems to me that the Plenipotentiaries had in their minds the meaning which at that time attached to the expression "contraband of war" resulting from the decisions of the courts of law of the nations of Europe and America; principally indeed the decisions in the English Courts on cases arising during the Napoleonic War. What then is the result of those decisions? What meaning has been thereby attached to the expression "contraband of war"? The result has been to attach to that expression the following twofold meaning:—(1) Absolute contraband of war—which includes everything useful for war only; (2) That which is conditional contraband of war—which includes all things which though useful for both peace and war become contraband if destined for the purposes of war: excluding from the meaning of contraband of war such things as are useful for the purposes of peace only. "Provisions," consequently, come within the definition of conditional contraband only, if and when destined for the enemy's forces; otherwise they are excluded from the definition. That is, in my opinion, the true meaning to be attached to the expression "contraband of war," and that is the sense which, in my opinion, that expression bears on a true construction of the Declaration of the Plenipotentiaries who signed the Treaty of Paris in 1856. That is, in my opinion, the sense in which the parties to the charter of the ship *Prometheus* must be taken to have understood the expression "contraband of war" when they agreed by Clause 37, that the ship *Prometheus* was not to "carry any contraband of war." To construe that expression as meaning whatever might at any time, that is to say from time to time, be declared by Russia to be contraband, as the learned counsel for the owner contended I should, would be

support into the contract between the parties an element of uncertainty
 none need exist. The contract was made in Hongkong, and therefore
 the absence of evidence to the contrary which I could act upon the parties
 be taken to have used the expression "contraband of war" in the sense
 which [it] is understood in British courts of law, which is its sense in
 international law. It cannot be successfully contended that provisions would
 be regarded by British courts of law as unconditional contraband of war, or
 there is any likelihood that they will ever take that view. Had this court
 been asked at any time between the signing of the charter party on the 10th
 of January 1904 and the issuing of the Russian declaration to construe the
 meaning of the words contraband of war it cannot be doubted that it would
 have excluded provisions from the category of unconditional contraband. It
 is contended however that the court ought to place a different meaning on
 the expression, after, and in view of, the terms of the Russian declaration,
 such as Russia being a sovereign independent power has a prerogative
 to declare whatever she pleases to be contraband of war in any war in
 which she may be engaged, and that the effect of the Russian declaration
 has been to make provisions unconditionally contraband the master of
 the ship *Prometheus* was excused from loading them on his ship. In this
 contention I am unable to concur. In the view which I take of the effect of
 the Declaration under the Treaty of Paris of 1856, and of the undertaking
 by several powers signatory thereto, given in the Protocol No. 24, not
 far apart from the principles enunciated in the Declaration, I think that
 Russia was not at liberty to declare provisions unconditional contraband of
 war and that her declaration in that respect could not affect the contract
 between the parties to this charter party, even supposing it could be held
 that contraband of war means, as used in the charter party, whatever Russia
 may consider as such: for Russia having been a party to the solemn declara-
 tion of "fixed principles" under the Treaty of Paris was not at liberty to
 disregard those principles and was therefore bound to recognise, and act
 in accordance with the generally accepted rule of international law that provisions are not
 unconditional contraband. . . . [The Court's discussion of *Pollard v. Bell*,
 12 R. 434, and the French construction of rice as contraband in 1855 is
 cited.] Applying the principle of that case [*Pollard v. Bell*] to the present
 I say that the Russian declaration including provisions among the list
 of articles absolutely contraband and as departing from the recognised cus-
 tom of nations had no binding effect upon other nations, and consequently
 cannot excuse the non-performance of the contract under the charter party
 between the Osaka Shosen Kaisha and the owners of the *S.S. Prometheus*.
 It is contended on behalf of the owners of the *Prometheus* that the term
 as applied to this recognised system of principles and rules known as
 international law is an inexact expression, that there is, in other words, no

CUSTOM: THE OPINIONS OF WRITERS

such thing as international law; that there can be no such law binding all nations inasmuch as there is no sanction for such law, that is to say there is no means by which obedience to such law can be imposed upon a given nation refusing obedience thereto. I do not concur in that contention. In my opinion a law may be established and become international, that is to say binding upon all nations, by the agreement of such nations to be bound thereby, although it may be impossible to enforce obedience thereto by a given nation party to the agreement. The resistance of a nation to a law to which it has agreed does not derogate from the authority of the law because that resistance cannot, perhaps, be overcome. Such resistance merely renders the resisting nation a breaker of the law to which it has given its adherence, but it leaves the law, to the establishment of which the resisting nation is a party, still subsisting. Could it be successfully contended that because a given person or body of persons possessed for the time being power to annul an established municipal law such law had no existence? The answer to such a contention would be that the law still existed, though it might not for the time being be possible to enforce obedience to it. My answer to the question put to me by the arbitrator must therefore, for the reasons I have given, be (1) that the cargo intended to be loaded by the charterers of the steamship *Prometheus* was not contraband of war within the meaning of the charter party; (2) that the Russian declaration constituting provisions of unconditional contraband was not binding upon neutrals who were not parties thereto, and consequently has no bearing upon the construction of the charter party between the Osaka Shosen Kaisha and the owners of the *Prometheus*. . . .

The special case will now be remitted to the arbitrator . . .¹

§ 6. CUSTOM: THE OPINIONS OF WRITERS

The document below is a case decided by the Supreme Court of the United States. It involved a question of international law arising in the Spanish-American War and required the consideration of what evidence was needed to prove the existence of a binding international custom.

The Paquete Habana—The Lola

SUPREME COURT OF THE UNITED STATES, 1900

175 U. S. 677.

[In the course of the Spanish-American War of 1898, two small fishing smacks, the *Paquete Habana* and the *Lola*, were captured by ships of the United States Navy.]

¹For additional materials on contraband, see §§ 159, 166, and Chapter XVIII below.

United States, and condemned and sold by the United States court at Key West as enemy property. On appeal to the United States Supreme Court, the questions were: Are fishing smacks, in the absence of treaty or domestic law, exempt from capture under the law of nations? If so, is this principle of the law of nations part of the domestic law of the United States?]

MR. JUSTICE GRAY: . . . [An exhaustive examination of the practice is omitted.] International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Hilton v. Guyot*, 159 U. S. 113, 163, 164, 214, 215, 16 Sup. Ct. 139, 40 L. Ed. 95.

Wheaton places, among the principal sources of international law, "text-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent." As to these he forcibly observes: "Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles." Wheaton's *International Law* (8th ed.), No. 15.

Chancellor Kent says: "In the absence of higher and more authoritative sanctions, the ordinances of foreign states, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law." I Kent, Com. 18.

It will be convenient, in the first place, to refer to some leading French treatises on international law, which deal with the question now before us,

not as one of the law of France only, but as one determined by the general consent of civilized nations. . . .

The modern German books on international law, cited by the counsel for the appellants, treat the custom, by which the vessels and implements of coast fishermen are exempt from seizure and capture, as well established by the practice of nations. *Heffter*, No. 137; 2 *Kaltenborn*, No. 237, p. 480; *Bluntschli*, No. 667; *Perels*, No. 37, p. 217. . . .

Two recent English text-writers, cited at the bar, (influenced by what Lord Stowell said a century since), hesitate to recognize that the exemption of coast fishing vessels from capture has now become a settled rule of international law. Yet they both admit that there is little real difference in the views, or in the practice, of England and of other maritime nations; and that no civilized nation at the present day would molest coast fishing vessels, so long as they were peaceably pursuing their calling, and there was no danger that they or their crews might be of military use to the enemy. Hall, in section 148 of the fourth edition of his *Treatise on International Law*, after briefly sketching the history of the positions occupied by France and England at different periods, and by the United States in the Mexican War, goes on to say: "In the foregoing facts there is nothing to show that much real difference has existed in the practice of the maritime countries. England does not seem to have been unwilling to spare fishing vessels so long as they are harmless, and it does not appear that any State has accorded them immunity under circumstances of inconvenience to itself. It is likely that all nations would now refrain from molesting them as a general rule, and would capture them so soon as any danger arose that they or their crews might be of military use to the enemy; and it is also likely that it is impossible to grant them a more distinct exemption." So T. J. Lawrence, in section 206 of his *Principles of International Law*, says: "The difference between the English and the French view is more apparent than real; for no civilized belligerent would now capture the boats of fishermen plying their avocation peaceably in the territorial waters of their own State; and no jurists would seriously argue that their immunity must be respected if they were used for warlike purposes, as were the smacks belonging to the northern ports of France, when Great Britain gave the order to capture them in 1800."

But there are writers of various maritime countries, not yet cited, too important to be passed by without notice. . . .

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with

of the Dutch on the Talautse Isles (Sangi) in 1677 was a violation of the Treaty of Münster and whether this circumstance might have prevented the acquisition of sovereignty even by means of prolonged exercise of state authority, need not be examined, since the Treaty of Utrecht recognized the state of things existing in 1714 and therefore the suzerain right of the Netherlands over Tabukan and Miangas.

The conditions of acquisition of sovereignty by the Netherlands are therefore to be considered as fulfilled. It remains now to be seen whether the United States as successors of Spain are in a position to bring forward an equivalent or stronger title. This is to be answered in the negative.

The title of discovery, if it had not been already disposed of by the Treaties of Münster and Utrecht would, under the most favorable and most extensive interpretation, exist only as an inchoate title, as a claim to establish sovereignty by effective occupation. An inchoate title however cannot prevail over a definite title founded on continuous and peaceful display of sovereignty . . .

The Netherlands title of sovereignty, acquired by continuous and peaceful display of state authority during a long period of time going probably back beyond the year 1700, therefore holds good . . .

Supposing that, at the time of the coming into force of the Treaty of Paris, the Island of Palmas (or Miangas) did not form part of the territory of any state, Spain would have been able to cede only the rights which she might possibly derive from discovery or contiguity. On the other hand, the inchoate title of the Netherlands could not have been modified by a treaty concluded between third Powers; and such a treaty could not have impressed the character of illegality on any act undertaken by the Netherlands with a view to completing their inchoate title—at least as long as no dispute on the matter had arisen, *i.e.*, until 1906.

Now it appears from the report on the visit of General Wood to Palmas (or Miangas), on January 21, 1906, that the establishment of Netherlands authority, attested also by external signs of sovereignty, had already reached such a degree of development, that the importance of maintaining this state of things ought to be considered as prevailing over a claim possibly based either on discovery in very distant times and unsupported by occupation, or on mere geographical position.

This is the conclusion reached on the ground of the relative strength of the titles invoked by each party, and founded exclusively on a limited part of the evidence concerning the epoch immediately preceding the rise of the dispute.

This same conclusion must impose itself with still greater force if there be taken into consideration—as the arbitrator considers should be done—all the evidence which tends to show that there were unchallenged acts of

a consequence is enough to expose the fallacy of any arguments that are addressed to shew, that these islands are not to be considered as part of the territory of America. Whether they are composed of earth or solid rock, will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil.

I am of opinion that the right of territory is to be reckoned from those islands. That being established, it is not denied that the actual capture took place within the distance of three miles from the islands, and at the very threshold of the river. . . .

The conduct of the captors has on all points been highly reprehensible. Looking at all the circumstances of previous misconduct, I feel myself bound to pronounce, that there has been a violation of territory, and that as to the question of property, there was not sufficient ground of seizure; and that these acts of misconduct have been further aggravated, by bringing the vessel to England, without any necessity that can justify such a measure. In such a case it would be falling short of the justice due to the violated rights of America and to the individuals who have sustained injury by such misconduct, if I did not follow up the restitution which has passed on the former day, with a decree of costs and damages.

§ 46. ACQUISITION BY TREATY: CESSION

Treaty Between the United States and the French Republic, April 30, 1803, for the Cession of Louisiana ¹

Hunter Miller, *Treaties and Other International Acts of The United States of America*, II, 498-515.

The President of the United States of America and the First Consul of the French Republic in the name of the French People desiring to remove all Source of misunderstanding relative to objects of discussion mentioned in the Second and fifth articles of the Convention of the 8th Vendémiaire an 9/30 September 1800 relative to the rights claimed by the United States in virtue of the Treaty concluded at Madrid the 27 of October 1795, between His Catholic Majesty, & the Said United States, & willing to

¹ Submitted to the Senate, October 17, 1803. Resolution of advice and consent, October 20, 1803. Ratified by the United States, October 21, 1803. Ratified by France, May 22, 1803. Ratifications exchanged at Washington, October 21, 1803. Proclaimed, October 21, 1803.

NOTE: Miller says, "This treaty and the two conventions of the same date . . . formed together one transaction; they were concurrently signed, and by the express terms of Article 9 of the treaty their ratifications were interdependent and were concurrently exchanged." *Treaties*, etc., II, 505. Of these two treaties one (printed in Miller as Document 28, pp. 512 ff.) is a *Convention for the Payment of Sixty Million Francs (\$11,250,000) by the United States*; the other (printed in Miller as No. 30, pp. 516 ff.) is a *Convention for the Payment of Sums Due by France to Citizens of the United States*. The cession may also be viewed as a sale, and as a part of a more general settlement.

whether the legislature has or has not done what foreign powers may consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an act of the legislature is *ultra vires* as in contravention of generally acknowledged principles of international law. For us an Act of Parliament duly passed by Lords and Commons and assented to by the King, is supreme, and we are bound to give effect to its terms. The counsel for the appellant advanced the proposition that statutes creating offences must be presumed to apply (1) to British subjects; and (2) to foreign subjects in British territory; but that short of express enactment their application should not be further extended. The appellant is admittedly not a British subject, which excludes (1); and he further argued that the *locus delicti*, being in the sea beyond the three-mile limit, was not within British Territory; and that consequently the appellant was not included in the prohibition of the statute. Viewed as general propositions, the two presumptions put forward by the appellant may be taken as correct. This, however, advances the matter but little, for like all presumptions they may be redargued, and the question remains whether they have been redargued on this occasion.

The first thing to be noted is that the prohibition here, a breach of which constitutes the offence, is not an absolute prohibition against doing a certain thing, but a prohibition against doing it in a certain place. Now, when a legislature, using words of admitted generality—"It shall not be lawful," &c., "Every person who," &c.—conditions an offence by territorial limits, it creates, I think, a very strong inference that it is, for the purpose specified, assuming a right to legislate for that territory against all persons whomsoever. . . .

It is said by the appellant that all this must give way to the consideration that International Law has firmly fixed that a *locus* such as this is beyond the limits of territorial sovereignty; and that consequently it is not to be thought that in such a place the legislature could seek to affect any but the King's subjects.

It is a trite observation that there is no such thing as a standard of International Law, extraneous to the domestic law of a kingdom, to which appeal may be made. International Law, so far as this Court is concerned, is the body of doctrine regarding the international rights and duties of States which has been adopted and made part of the law of Scotland. Now can it be said to be clear by the law of Scotland that the *locus* here is beyond what the legislature may assert right to affect by legislation against all whomsoever for the purpose of regulating methods of fishing?

I do not think I need say anything about what is known as the three-mile limit. It may be assumed that within the three miles the territorial sovereignty would be sufficient to cover any such legislation as the present. It is enough to say that that is not a proof of the counter proposition that

outside the three miles no such result could be looked for. The *locus* although outside the three-mile limit, is within the bay known as the Moray Firth, and the Moray Firth, says the respondent, is *intra fauces terrae*. Now, I cannot say that there is any definition of what *fauces terrae* exactly are. But there are at least three points which go far to shew that this spot might be considered as lying therein.

1st. The *dicta* of the Scottish institutional writers seem to show that it would be no usurpation, according to the law of Scotland, so to consider it. . . .

2d. The same statute puts forward claims to what are at least analogous places. If attention is paid to the schedule appended to section 6, many places will be found far beyond the three-mile limit—e. g., the Firth of Clyde near its mouth. I am not ignoring that it may be said that this in one sense is proving *idem per idem*, but none the less I do not think the fact can be ignored.

3d. There are many instances to be found in decided cases where the right of a nation to legislate for waters more or less landlocked or landembraced, although beyond the three-mile limit, has been admitted. They will be found collected in the case of the *Direct United States Cable Company v. Anglo-American Telegraph Company*, 2 A. C. 398 [1877], the bay there in question being Conception Bay, which has a width at the mouth of rather more than 20 miles.

It seems to me therefore, without laying down the proposition that the Moray Firth is for every purpose within the territorial sovereignty, it can at least be clearly said that the appellant cannot make out his proposition that it is inconceivable that the British Legislature should attempt for fishery regulation to legislate against all and sundry in such a place. And if that is so, then I revert to the considerations already stated which as a matter of construction made me think that it did so legislate. . . .

I am therefore of opinion that the conviction was right, that both questions should be answered in the affirmative, and that the appeal should be dismissed.

[The remaining portion of the opinion is omitted, as are the opinions of LORD KYLLACHY, LORD JOHNSTON, and LORD SALVESON.]

The Court . . . dismissed the appeal.¹

¹ "On diplomatic representations being made to the Foreign Office, the fine was remitted."—A. P. Higgin's note to Hall, *International Law*, 7th Ed. (1917), p. 160.—Ed.

RELATION OF INTERNATIONAL LAW TO NATIONAL (OR "MUNICIPAL") LAW (*Continued*)

The case printed in part below deals with the relation of international law to the law of England and lays down important principles for determining how international law is to be considered a part of the law of England. What are the principles?

West Rand Central Gold Mining Co., Ltd., *v.* The King

GREAT BRITAIN, KING'S BENCH DIVISION, 1905

[1905] 2 K. B. 391.

Petition of right by the West Rand Central Gold Mining Company,

[statement of facts and argument of counsel omitted.]

MR. ALVERSTONE, C. J.: In this case the Attorney-General, on behalf of the Crown, demurred to a petition of right presented in the month of June, 1904, by the West Rand Central Gold Mining Company, Limited. The petition alleged that two parcels of gold, amounting in all to the value of £1104, had been seized by officials of the South African Republic—£1104 on October 2 in course of transit from Johannesburg to Cape Town, and on October 9, taken from the bank premises of the petitioners. No statement was made in the petition of the circumstances under which or the right by which, the Government of the Transvaal Republic had seized the gold; but it was stated in paragraph 6: "That the gold in each case taken possession of by, and on behalf of, and for the purpose of, the then existing Government of the said Republic, and that the Government, by the laws of the said Republic, was under a liability to return the said gold, or its value, to your suppliants. None of the said gold was returned to your suppliants, nor did the said government make any payment in respect thereof." The petition then alleged that a state of war existed at 5 P.M. on October 11, 1899, that the forces of the late Queen annexed the Republic, and that by a Proclamation of September 1, 1900, the whole of the territories of the Republic were annexed to, and became part of, Her Majesty's dominions, and that the government of the Republic ceased to exist. The petition then averred that by reason of the conquest and annexation Her Majesty succeeded to the sovereignty of the Transvaal Republic, and became entitled to its property; and that the obligation which was binding on the Government was binding upon His present Majesty the King. Before dealing with the questions of law which were argued before us,

we think it right to say that we must not be taken as acceding to the view that the allegations in the petition disclosed a sufficient ground for war. The petition appears to us demurrable for the reason that it shews no indication of a contractual nature on the part of the Transvaal Government. . . . all that appears in the petition the seizure might have been an act of violence. . . .

Lord Robert Cecil argued that all contractual obligations incurred by a conquered State, before war actually breaks out, pass upon annexation to the conqueror, no matter what was their nature, character, origin, or basis. . . . His main proposition was divided into three heads: First, that, by national law, the Sovereign of a conquering State is liable for the obligations of the conquered; secondly, that international law forms part of the law of England; and, thirdly, that rights and obligations, which were binding upon the conquered State, must be protected and can be enforced by the municipal Courts of the conquering State.

In support of his first proposition Lord Robert Cecil cited passages from various writers on international law. In regard to this class of authorities it is important to remember certain necessary limitations to its value. There is an essential difference, as to certainty and definiteness, between municipal law and a system or body of rules in regard to international conduct, where the law, so far as it exists at all (and its existence is assumed by the phrase "international law"), rests upon a consensus of civilized States, not expressed in any treaty or pact, nor possessing, in case of dispute, any authorized or authoritative interpreter; and capable, indeed, of proof, in the absence of some conventional international agreement, only by evidence of usage to be obtained from the action of nations in similar cases in the course of their history. It is clear that, in respect of many questions that may arise, there will be room for difference of opinion as to whether such a consensus could be shewn to exist. Perhaps it is in regard to the extra-territorial privileges of ambassadors, and in regard to the system of limits as to territorial waters, that it is least certain, to doubt or question. The views expressed by learned writers on international law have done in the past, and will do in the future, valuable service in helping to create the opinion by which the range of the consensus of civilized nations is enlarged. But in many instances their pronouncements must be regarded rather as the embodiments of their views as to what ought to be done from an ethical standpoint, the conduct of nations *inter se*, than the enunciation of a rule or practice so universally approved or assented to as to be fairly termed, even in the qualified sense in which that word can be used, "law." The reference which these writers not infrequently make to stipulations in particular treaties as acceptable evidence of international law is as little convincing as the attempt, not unknown to our courts, to es-

a trade custom which is binding without being stated, by adducing evidence of express stipulations to be found in a number of particular contracts.

Before, however, dealing with the specific passages in the writings of jurists upon which the suppliants rely, we desire to consider the proposition, that by international law the conquering country is bound to fulfil the obligations of the conquered, upon principle; and upon principle we think it cannot be sustained. When making peace the conquering Sovereign can make any conditions he thinks fit respecting the financial obligations of the conquered country, and it is entirely at his option to what extent he will adopt them. It is a case in which the only law is that of military force. This, indeed, was not disputed by counsel for the suppliants; but it was suggested that although the Sovereign when making peace may limit the obligations to be taken over, if he does not do so they are all taken over, and no subsequent limitation can be put upon them. What possible reason can be assigned for such a distinction? Much inquiry may be necessary before it can be ascertained under what circumstances the liabilities were incurred; and what debts should *in foro conscientiae* be assumed. There must also be many contractual liabilities of the conquered State of the very existence of which the superior power can know nothing, and as to which persons having claims upon the nation about to be vanquished would, if the doctrine contended for were correct, have every temptation to concealment—others, again, which no man in his senses would think of taking over. A case was put in argument which very well might occur. A country has issued obligations to such an amount as wholly to destroy the national credit, and the war, which ends in annexation of the country by another Power, may have been brought about by the very state of insolvency to which the conquered country has been reduced by its own misconduct. Can any valid reason be suggested why the country which has made war and succeeded should take upon itself the liability to pay out of its own resources the debts of the insolvent State, and what difference can it make that in the instrument of annexation or cessation of hostilities matters of this kind are not provided for? We can well understand that, if by public proclamation or by convention the conquering country has promised something that is inconsistent with the repudiation of particular liabilities, good faith should prevent such repudiation. We can see no reason at all why silence should be supposed to be equivalent to a promise of universal novation of existing contracts with the Government of the conquered State. It was suggested that a distinction might be drawn between obligations incurred for the purpose of waging war with the conquering country and those incurred for general State expenditure. What municipal tribunal could determine, according to the laws of evidence to be observed by that tribunal, how particular sums had been expended, whether borrowed before or during the war? It was this and cognate difficulties

which compelled Lord Robert Cecil ultimately to concede that he must contend that the obligation was absolute to take over all debts and contractual obligations incurred before war had been actually declared. . . .

The second proposition urged by Lord Robert Cecil, that international law forms part of the law of England, requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must shew either that the particular proposition put forward has been recognised and acted upon by our country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized State would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognised, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations. . . .

We pass now to consider the third proposition upon which the success of the suppliants in this case must depend—namely, that the claims of the suppliants based upon the alleged principle that the conquering State is bound by the obligations of the conquered can be enforced by petition of right. . . . It must not be forgotten that the obligations of conquering States with regard to private property of private individuals, particularly land as to which the title had already been perfected before the conquest or annexation, are altogether different from the obligations which arise in respect of personal rights by contract. As is said in more cases than one, cession of territory does not mean the confiscation of the property of individuals in that territory. If a particular piece of property has been conveyed to a private owner or has been pledged, or a lien has been created upon it, considerations arise which are different from those which have to be considered when the question is whether the contractual obligation of the conquered State towards individuals is to be undertaken by the conquering State. The English cases on which reliance was placed were *United States v. Prioleau*, 2 H. & M. 559, in which a claim was made by the United States Government to cotton which had been the property of the Confederate States; *United States v. Macrae*, L. R. 8 Eq. 69, which recognised the right of the Government suppressing rebellion to all moneys, goods, and treasures which were public property at the time

outbreak: *Republic of Peru v. Peruvian Guano Co.*, 36 Ch. D. 489; *Republic of Peru v. Dreyfus*, 38 Ch. D. 348. The only principle, however, can be deduced from these cases is that a government claiming rights perty and rights under a contract cannot enforce those rights in our without fulfilling the terms of the contract as a whole. They have, in dgment, no bearing upon the propositions which we have been dis- g. We are aware that we have not commented upon all the cases which cited before us—we have not failed to consider them; and any argu- which could be founded upon them seem to us to be covered by the ations already made. We are of opinion, for the reasons given, that no on the part of the suppliants is disclosed by the petition which can be ed as against His Majesty in this or in any municipal Court; and we ore allow the demurrer, with costs. dgment for the Crown.

RELATION OF INTERNATIONAL LAW TO NATIONAL (OR "MUNICIPAL") LAW (*Continued*)

Advisory Opinion, German Settlers in Poland

Permanent Court of International Justice, 1923.

see below, § 72.

RELATION OF INTERNATIONAL LAW TO NATIONAL (OR "MUNICIPAL") LAW (*Concluded*)

NOTE BY THE EDITOR

D. Masters, after studying the enforcement of international law in an, Swiss, French and Belgian courts, writes, "... the courts of all countries are guilty of carelessness in the use of the term 'international' in fact, it must be stated that not one case could be found which could be favorably with Lord Alverstone's opinion in *West Rand Central Mining Co. v. The King* with respect to clarity of expression and exact tion of the court's understanding of the term 'international law.'"¹ Only ratified treaties occupy a clearer position with respect to their cement in domestic law than do the principles of customary inter- al law, because treaties are more explicit and because it is often difficult ve the acceptance of a particular custom by a particular State under rules as those of the *West Rand Central* case.

In some States national constitutions require that treaties or the generally recognized principles of international law be accepted as a part of national law. Thus Article VI of the Constitution of the United States provides: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; *and all Treaties made, or which shall be made, under the Authority of the United States*, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Law, *in the Constitution or Laws of any State to the contrary notwithstanding* (Italics by the editor.) Substantially similar provisions may be found in the constitutions of Argentina, Haiti, and other Latin-American States. The most detailed provisions of a national constitution on the relation of treaties to national laws are to be found in the constitution of republican Spain (1931), which not only provides that the universal norms of international law will be observed and incorporated in Spain's positive law (Article 17) but that treaties ratified by Spain, registered with the League of Nations, "and having the character of international laws," must be considered "integral parts" of Spanish legislation, "which must be adapted to the circumstances." The Government is required to present to the Chamber of Deputies "proposals of law" necessary to accomplish this adaptation. No law conforming to such a treaty can be constitutionally enacted unless the treaty has previously been denounced according to the treaty terms, which denunciation must be approved by the Cortes (legislative body).³

More frequently, constitutional provisions follow that in Article 4 of the 1919 Constitution of the German Republic: "The generally [allgemein] recognized rules of international law are deemed to form an integral and obligatory part of German federal law." Substantially similar provisions have appeared in constitutions of Austria and Estonia.

Even under the provision of the United States Constitution cited above, important problems remain for the judiciary in determining when treaties are of their own force the law of the land. Is an Act of Congress required in order to give effect to the provisions of a treaty? In general, the courts have replied no, if the treaty is self-executing; yes, if it is not self-executing. The Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either party engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court." *Foster v. Neilson*

² See Mirkin-Guetzévitch, *Les constitutions des nations américaines* (Paris, 1933), "Droit international et droit constitutionnel," 38 *Hague Recueil des Cours* (1931), 395.

³ Mirkin-Guetzévitch, *Droit Constitutionnel International* (1933), 160 ff.

2 Peters 253, 314. Other problems are discussed in *Whitney v. Robertson* (1888) 124 U. S. 190, at 194:⁴

A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether. By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing. If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interest. The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance. . . .

Masters found that the rules for the application of custom as national law were substantially those of the *West Rand Central* case in the States studied. In Germany, "Rules of customary international law which are generally recognized and which have received the assent of Germany are applied by the courts. They are deemed to form part of German federal law. Statutes are construed with the presumption that they contain an implied reservation to the effect that they shall not be applied whenever their provisions conflict with generally recognized rules of customary international law which have received the assent of Germany."⁵ In Switzerland there are few cases, but "generally recognized rules of customary international law are deemed to be part of Swiss law equal to federal statutes. Federal statutes are interpreted with the presumption that the legislature did not intend to violate a generally recognized rule of customary international law."⁶ In

⁴ Reprinted in § 92 below.

⁵ Masters, *op. cit.*, p. 85; and see Chap. VI, especially pp. 81 ff., for discussion of the *Rhineland Ordinances Case*.

⁶ *Ibid.*, p. 122.

France, though the relationship has never been stated precisely by the courts, on the basis of limited evidence Masters states: "Rules of customary international law which have been universally recognized or which have been accepted by France are applied by French courts as part of French law. Where such rules conflict with French statutes, the court will, as a rule, apply the statutes; they will attempt to prove that no actual conflict exists between the statutes and customary international law. In some cases, the courts have interpreted the statutes strictly, and applied the rule of customary international law, but these are in the minority."⁷ As to Belgium,

Generally accepted rules of customary international law are deemed to have been accepted by Belgium unless there is clear proof to the contrary. The courts will determine in each case whether a given rule is a generally recognized rule of customary international law. Such a rule will be applied by the courts as part of Belgian municipal law. A rule of customary international law which has become a part of Belgian law will be applied by the courts, even though it may modify a Belgian statute in form. It would probably be applied even though it modify a Belgian statute in substance, unless there was clear proof that the legislature intended to violate customary international law. Statutes will, however, be interpreted with the presumption that the legislature did not intend to violate generally recognized rules of customary international law.⁸

The stronger statement of the force of recognized international custom in Belgian courts is drawn almost entirely from the various adjudications of *Drécoll . . . v. Baron Goffinet . . .* in the *Tribunal civil* of Brussels, the *Cour d'appel* of Brussels, and the *Cour de cassation*.⁹

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Fenwick, *Cases*, pp. 1-36.

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Moore, *Digest*, §§ 1-2.

Scott, *Cases*, pp. 1-18.

——— and Jaeger, *Cases*, pp. 1-33.

⁷ *Ibid.*, p. 192.

⁸ *Ibid.*, p. 227.

⁹ Citations and discussion in Masters, *op. cit.*, p. 215. The judgment in the Court of Cassation is reprinted in Scott and Jaeger, *Cases*, p. 26.

national character of the person injured by the offence. Of these five principles, the first is everywhere regarded as of primary importance and of fundamental character. The second is universally accepted, though there are striking differences in the extent to which it is used in the different national systems. The third is claimed by most States, regarded with misgivings in a few, and generally ranked as the basis of an auxiliary competence. The fourth is widely though by no means universally accepted as the basis of an auxiliary competence, except for the offence of piracy, with respect to which it is the generally recognized principle of jurisdiction. The fifth, asserted in some form by a considerable number of States and contested by others, is admittedly auxiliary in character and is probably not essential for any State if the ends served are adequately provided for on other principles.

"The plan of the present Convention has been determined primarily by the recognition which must be accorded to the general principles enumerated above. Following Article 1 on the use of terms and Article 2 on the scope of the Convention, Article 3 states the territorial principle in its broadest acceptable terms. Article 4 formulates a similar principle for offences committed on public or private ships or aircraft. Article 5 states the nationality principle in its broadest acceptable terms; and Article 6 formulates a similar principle for offences committed by persons who may be assimilated to nationals for certain purposes or at certain times. The protective principle is incorporated in Article 7 for offences against the security of the state and in Article 8 for offences of counterfeiting. Article 9 states the principle of universality for the offence of piracy; and Article 10 formulates the same principle, in carefully guarded terms, for other crimes. Article 11 incorporates by reference such immunities from the exercise of penal jurisdiction as are accorded by international law or international convention. Articles 12, 13, 14, and 15 incorporate essential safeguards with respect to the prosecution and punishment of aliens. Article 16 forbids the prosecution or punishment of any person of whom custody has been obtained in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated. Article 17 formulates certain general principles of interpretation; and Article 18 provides for the settlement of disputes with respect to the interpretation or application of the Convention. . . .

"The Convention is in one sense an epitome of the results of an investigation which has ranged over a wide field and which is reported at some length in the appended comment. The investigation indicates that States have much more in common with respect to penal jurisdiction than is generally appreciated, that the gulf between those States which stress traditionally the territorial principle and the States which make an extensive use of other principles is by no means so wide as has been generally assumed, that there are practicable bases of compromise, without sacrifice of any essential state interest, on most if not all the controverted questions, and that it is feasible to attempt a definition of penal jurisdiction in a carefully integrated instrument which combines recognition of the jurisdiction asserted by most States in their national legislation and jurisprudence with such limitations and safeguards as may be calculated to make broad definitions of competence acceptable to all. The Convention is submitted as a statement of the penal jurisdiction of States which should have the advantage, for every State, of substituting for the petty conflicts and uncertainties that have caused irritation in the past the security that comes from a common understanding of general principles."—29 *A.J.I.L.* (Supp., July, 1935) 445-447.

north of Europe, passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade, must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the government may be extended somewhat further; and foreign nations submit to such regulations as are reasonable in themselves, and are really necessary to secure that monopoly of colonial commerce, which is claimed by all nations holding distant possessions.¹

"Hot pursuit."—"The pursuit of a foreign vessel for an infringement of the laws and regulations of a Coastal State begun when the foreign vessel is within the inland waters or territorial sea of the State may be continued outside the territorial sea so long as the pursuit has not been interrupted. The right of pursuit ceases as soon as the vessel which is pursued enters the territorial sea of its own country or of a third State." This paragraph of Article 11 of "The Legal Status of the Territorial Sea" (see page 226) states what is known as the right (or doctrine) of "hot pursuit."

The statement of L. H. Woolsey in 1912 "that the question whether municipal seizures beyond the three-mile limit are legal has been decided affirmatively by the municipal courts, bound by municipal law, and negatively by international tribunals governed by international law"² still appears to be accurate as applied to cases of hot pursuit. Judgments of national courts upholding the right of hot pursuit are: *The Ship North v. The King* (1906) 37 Canada Supreme Court Reports, 385 (pursuit begun inside three-mile limit, ended shortly outside); *Gillam v. U. S.* (1928) 27 F. (2nd) 296 (pursuit begun outside three-mile limit but within four-league limit and one hour's steaming distance of coast under liquor treaty of 1924; seizure apparently outside both the four-league limit and the hour's steaming distance), affirmed in 278 U. S. 635. Cases in international tribunals denying the right of hot pursuit are: cases of J. H. Lewis and C. H. White, United States-Russia Arbitration of 1902, U. S. *Foreign Relations*, 1902, 454, 456, and 459, 462 ("the jurisdiction of a State does not extend beyond the limits of the territorial sea, unless this rule has been derogated by a special convention"); *The Itata*, United States-Chile Mixed Claims Commission, Convention of 1892, 3 Moore, *Arbitrations*, 3067.

The much-discussed case of the *I'm Alone* was decided in 1935 by the Commissioners agreed upon by the United States and Great Britain, without any decision on the question of hot pursuit, though that question had received much attention in the arguments.

The *I'm Alone*, known to be a liquor smuggler, was sighted off the coast of Louisiana by the Coast Guard vessel *Wolcott*, when it was outside the three-mile limit but within one hour's sailing distance from shore. The

¹ *Church v. Hubbard* (1804) 2 Cranch 187, 234-235.

² U. S. *For. Rel.*, 1912, p. 1297.

Did the Court resort to an international convention in deciding this case? What was the basis of its judgment, in terms of Article 38? What evidence did the Court use in establishing this basis?

6. Taking any five documents assigned by your instructor from this book, place each of them in one of the categories of Article 38 of the Statute of the Permanent Court of International Justice (§ 4). Then answer these questions: Of what value is this document in establishing the existence of a rule of international law binding upon states in their relations with one another? Could it stand alone in establishing the existence of such a rule, or would it have to be supported by other evidence?

7. You are a judge of the Permanent Court of International Justice, deciding a case between Italy and Bolivia, involving the application of a principle of international law. Italy's claim is supported by (a) judicial decisions in the highest courts of Peru, Panama, and Germany, (b) a treaty between Italy and Bulgaria, (c) an arbitral award in a case between France and Spain. Bolivia's interpretation is supported by (d) passages from Grotius and fifteen other writers learned in international law, (e) judicial decisions in the highest courts of Bolivia and Italy. There is no treaty on the subject binding the litigating parties.

Evaluate each piece of evidence, (a) to (e) above.

How would you decide, and why?

Would it make any difference if thirty States, Bolivia and Italy included, were parties to a treaty covering the matter?

8. A dispute between States X and Y has been submitted to an arbitration tribunal. You are the agent (attorney) for one of the parties. Supporting your side of the case you have the pieces of evidence in the following list. Which is the best evidence that what you are contending for is a principle of international law binding States X and Y?

(a) Textbook on international law by a judge of the Permanent Court of International Justice.

(b) Award of a Franco-Mexican Claims Commission.

(c) A multilateral treaty to which all States except X and Y are parties.

(d) Excerpt from the Code of Justinian.

(e) Communication of the American Secretary of State to the British Ambassador, in the course of a diplomatic controversy over a similar question.

(f) Judgments of the highest courts of Paraguay, Japan, Germany, Arizona, and X and Y.

(g) Communication of the Minister of State X to the Secretary of State of the United States, made in the course of a diplomatic controversy over a similar question.

(h) Advisory Opinion of the Permanent Court of International Justice requested by the Council of the League of Nations in a similar controversy between State X and Russia.

(i) Judgment of the Permanent Court of International Justice in a dispute between Russia and Poland.

(j) Draft Convention, Harvard Law School Research in International Law.

(k) An Act of the United States Congress.

Can you think of evidence which would be better than any of those indicated?

9. "International law is a law which applies to States, not to individuals." Is this statement correct? Utilizing materials in this chapter, debate this subject.

III

Members of the Community of Nations

§ 11. MEMBERS OF THE COMMUNITY OF NATIONS

NOTE BY THE EDITOR

What are the entities subject to international law in the way in which individual persons are subject to domestic law? This is the central problem to be considered in the materials in this chapter. It is clear that individual persons, as such, are not the subjects of international law, though States measure their own rights and duties in international law by what is done to the persons and property of their nationals, and though certain persons, like pirates, have a status in international law (see § 62 below). It is also clear that "fully sovereign States" are subjects of international law, but what is a "fully sovereign State"? It is at least clear that it must be one having the legal capacity to enter into relations with other States. The Montevideo Convention of 1933 on the Rights and Duties of States¹ provided: "ARTICLE 1. The State as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; d) *capacity to enter into relations with the other States*. [Italics by the editor.] ARTICLE 2. The federal State shall constitute a sole person in the eyes of international law."

Theoretical difficulties arise because the moment a State having "capacity to enter into relations with other States" enters into a treaty, its freedom of action is to some extent diminished. State A may bind itself merely to treat resident aliens who are nationals of State B in a certain way; or it may bind itself at the other extreme to allow State B to conduct the whole of State A's foreign relations and even large segments of its internal administration; or it may agree to many relationships between these extremes. The theoretical question which troubles jurists is whether, at any point along the line, State A ceases to be "sovereign" or "independent" or even a "State" because it has agreed to surrender a part or all of its control over its foreign relations.

¹ U.S.T.S., No. 881; reprinted above, § 3.

"Equality of States."—The question is particularly difficult because the traditional theory of international law holds that all members of the international community are legally equal. "No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights," declared Chief Justice Marshall in 1825.² This concept was based on the philosophical ideas of a *state of nature* once widely held; since States were composed of men who were by nature free and independent, and who before the setting up of civil societies lived together in a state of nature; so sovereign States must be thought of as free persons living together in a state of nature. Since men are by nature equal, so are States. Differences in strength do not affect this: "A dwarf is as much a man as a giant is: a small republic is no less a sovereign State than the most powerful kingdom."³

This doctrine of the equality of States has been called "a misleading deduction from unsound premises."⁴ There is no proof of the equality of men or of States, or indeed of the existence of a "state of nature"; and actually States are unequal, whether wealth, power, or any other test is applied to them. Even more important is the fact that some States have unequal rights in law. Some States have accepted treaty restrictions as to their internal treatment of minorities (see § 16); others, called protectorates, have by treaty agreed to have the whole of their foreign relations conducted by another State (see § 18). The purpose of this chapter is to show these and many other *differences* in the international legal status of particular communities, brought about in each case by treaties intended to produce such differences.

It is true that international tribunals, when such questions are submitted to them, insist that States capable of entering into treaties are equally sovereign. Thus the World Court declared that it declined "to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty."⁵ Nevertheless, when the Court was asked to say whether a proposed customs union between independent Austria and Germany in 1931 violated treaty obligations of Austria not to alienate or endanger her independence, and "not to violate her

² *The Antelope*, 10 Wheaton 66, 122.

³ E. de Vattel, *The Law of Nations* . . . translated from the edition of 1758 by C. G. Fenwick, p. 7.

⁴ J. L. Brierly, *The Law of Nations*, 2d Ed. (1936), p. 30.

⁵ *The S. S. Wimbledon* (see § 57 below), *Publications*, P.C.I.J., Series A, No. 1 (1923), p. 25.

economic independence by granting to any state a special regime of exclusive advantages calculated to threaten" her independence, the Advisory Opinion of the Court⁶ in reality abandoned this theory. Only the seven dissenting judges adhered to it. Eight thought that by the proposed customs union Austria had endangered her economic independence; but more important, seven judges held that Austria's political independence had been endangered. While "independence" may not be "sovereignty," and neither is lost by being "endangered" or "threatened," the theory of equality of sovereignty seems not very hardy in the presence of severe strain.

Brierly says: "If the theory of equality . . . is interpreted to mean that all States have equal rights in law, it is contradicted by the facts. It is a true theory only if it means that the rights of one State, whatever they may be, are as much entitled to the protection of the law as the rights of any other, that is to say, if it merely denies that the weakness of a State is any excuse in law for disregarding its legal rights. This is the only sense in which any system of law can be said to recognize legal equality; all Englishmen are equally entitled to have their rights upheld by the law, but they do not all have equal rights."⁷

The materials in this chapter illustrate this problem without attempting to solve it. Members of the League of Nations (§ 12), the British Commonwealth of Nations (§ 13), and the Little Entente all operate under certain limitations as to the conduct of their foreign relations, as did Poland under the minorities treaty (§ 16) and Haiti under the Treaty of 1915 (§ 128). In general, communities having the capacity to enter into relations with other States and in a present legal position to exercise that capacity, are here called "fully sovereign States," not as a necessarily exact juristic statement, but for purposes of description. In the same way, communities which have "contracted away" their whole power to conduct current foreign relations are described as "dependent communities," even though they may still possess the "capacity to enter into relations with other States" which permitted them to confer upon another State the right to conduct their foreign relations (§§ 18, 19).

The variety displayed by the whole mass of these particular arrangements is astonishing. For a fair sampling of them, see Hudson, *Cases*, 2d ed. (1936), pp. 20-76. However, as Briggs says, "the status in international law of the British Dominions, the Papacy, unions of states, mandated areas, neutralized states, protectorates, and dependent communities *depends upon the facts of the particular case*."⁸ "The facts of the particular case" in each instance are the particular arrangements, treaty or otherwise, governing the

⁶ *Publications*, P.C.I.J., Series A/B, Fascicule No. 41 (1931).

⁷ *Op. cit.*, pp. 91-92.

⁸ *The Law of Nations* (1938), p. 64. Italics are the editor's.

situation of the community involved. Thus the World Court, in an advisory opinion on nationality decrees in Tunis and Morocco (protectorates of France) stated: "The extent of the powers of a protecting State in the territory of a protected State depends, first, upon the Treaties between the protecting State and the protected State establishing the Protectorate, and, secondly, upon the conditions under which the Protectorate has been recognized by third Powers as against whom there is an intention to rely on the provisions of these Treaties. In spite of common features possessed by Protectorates under international law, they have individual legal characteristics resulting from the special conditions under which they were created, and the stage of their development."⁹

Writers on international law, in the attempt to reduce the mass of these specialized materials to some clarifying order, have adopted classifications and definitions. These are useful if it is recognized that their purpose is primarily pedagogical, and that the evidence upon which such generalizations are based is always derived from specific legal arrangements.

§ 12. MEMBERS OF THE LEAGUE OF NATIONS

Article 1 of the Covenant of the League of Nations and the materials printed in Column (1), § 123, below, are designed to serve as a sort of directory to the present members of the community of nations. The political communities enumerated (most of them States in the unqualified sense of the word) may each be considered as an entity to which international law relates; *i. e.*, a community entitled to the rights, and subject to the obligations, of international law.

a. Covenant of the League of Nations, Article I, Annex

Part I of the Treaty of Versailles, signed June 28, 1919, in force as between ratifying States January 10, 1920. Text as published by Information Section of the League of Nations, 1938.

THE HIGH CONTRACTING PARTIES

In order to promote international co-operation and to achieve international peace and security

by the acceptance of obligations not to resort to war,

by the prescription of open, just and honourable relations between nations,

by the firm establishment of the understandings of international law as the actual rule of conduct among Governments,

and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another,
Agree to this Covenant of the League of Nations.

⁹ *Publications, P.C.I.J.*, Series B, No. 4 (1923), p. 27. Reprinted in § 34 below.

ARTICLE I

1. The original Members of the League of Nations shall be those of the Signatories which are named in the Annex to this Covenant, and also such of those other States, named in the Annex as shall accede without reservation to this Covenant. Such accessions shall be effected by a declaration deposited with the Secretariat within two months of the coming into force of the Covenant. Notice thereof shall be sent to all other Members of the League.

2. Any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guaranties of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments.

3. Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal.

ANNEX

1. Original Members of the League of Nations, Signatories of the Treaty of Peace.

United States of America	Haiti
Belgium	Hedjaz
Bolivia	Honduras
Brazil	Italy
British Empire	Japan
Canada	Liberia
Australia	Nicaragua
South Africa	Panama
New Zealand	Peru
India	Poland
China	Portugal
Cuba	Roumania
Ecuador	Serb-Croat-Slovene State
France	Siam
Greece	Czechoslovakia
Guatemala	Uruguay

States Invited to Accede to the Covenant

Argentine Republic	Denmark
Chile	Netherlands
Colombia	Norway

Paraguay
Persia
Salvador
Spain

Sweden
Switzerland
Venezuela

b. Is the League of Nations a Person in International Law?

NOTE BY THE EDITOR

There is controversy as to whether the League of Nations itself, considered as an entity, is a person in international law.¹ It is easy to agree that the League is not a State, any more than the European Commission of the Danube, called by the World Court "not a State, but an international institution with a special purpose."² It is more difficult to deny it some sort of international personality. The editor is inclined to agree with Sir John Fischer Williams, who says that the authors of the League "were making a step forward in international law: they were constructing, for the first time on any great scale, a thing in international law analogous to the body corporate in municipal law. They were creating a subject of rights and duties of limited and definite scope of a nature different from the subjects of rights and duties which alone, or almost alone, had hitherto been recognised in international law. And it was a true subject, a reality, in no sense a 'fiction' . . . Existing States remain as they were, with the same powers and constitutions as before, though they have come under covenant to exercise these powers in certain ways, but . . . a new member of definite capacities has been added to their society."³ Says E. W. Allen, "The League of Nations appeared before the Court of Appeal of Geneva as an 'international organism' enjoying privileges and immunities exempting it from the jurisdiction of local courts,"⁴ citing *Schmidlin v. Société des Nations*, February 6, 1925, reported in 21 *R.D.I.P.* (1926), 103.

§ 13. STATUS OF GREAT BRITAIN AND THE DOMINIONS

While international law postulates the equality and the independence of political communities having rights and obligations under it, the existing political organization of the world presents many anomalies. Outstanding among these is the problem presented by the British Empire. Is this political aggregation one person in international law, or is it several such persons, each of them subject to the obligations, and entitled to the rights, of independent states under international law? The United States Senators who objected to separate Membership in

¹ See P. E. Corbett, "What Is the League of Nations?" 5 *B.Y.J.L.* (1924).

² *Publications*, P.C.I.J., Series B, No. 14 (1927), p. 64.

³ *Chapters on Current International Law and the League of Nations* (1929), 477, at 480-481.

⁴ *The Position of Foreign States before National Courts* (1933), 6.

the League of Nations for the Dominion of Canada and the Union of South Africa may be presumed to have believed that the British Empire constituted a single State. On the other hand there are not lacking those who say, arguing on the basis of such materials as the Report printed below, that the British Dominions are independent members of a British "Commonwealth of Nations," united to the Kingdom of Great Britain and Northern Ireland only by specific legal bonds.

The document printed is a part of the Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926, a Report which was adopted by the Conference. As the Imperial Conferences are made up of representatives of the different governments in the United Kingdom and in the various Dominions, the Report may be regarded as an authoritative statement of the legal nature of the political community we call the British Empire.¹

Report of Inter-Imperial Relations Committee

IMPERIAL CONFERENCE, 1926

Text from *Summary of Proceedings* [Cmd. 2768], pp. 13 ff.

I. INTRODUCTION

We were appointed at the meeting of the Imperial Conference on the 25th October, 1926, to investigate all the questions on the Agenda affecting Inter-Imperial Relations. Our discussions on these questions have been long and intricate. We found, on examination, that they involved consideration of fundamental principles affecting the relations of the various parts of the British Empire *inter se*, as well as the relations of each part to foreign countries. For such examination the time at our disposal has been all too short. Yet we hope that we may have laid a foundation on which subsequent Conferences may build.

II. STATUS OF GREAT BRITAIN AND THE DOMINIONS

The Committee are of opinion that nothing would be gained by attempting to lay down a Constitution for the British Empire. Its widely scattered parts have very different characteristics, very differing histories, and are at very different stages of evolution; while considered as a whole, it defies classification and bears no real resemblance to any other political organization which now exists or has ever yet been tried.

There is, however, one most important element in it which, from a strictly constitutional point of view, has now, as regards all vital matters, reached its full development—we refer to the group of self-governing com-

¹ Consult further the *Statute of Westminster* (1931), 22 Geo. V Chap. IV, and M. O. Hudson, "Notes on the Statute of Westminster," 46 *Harvard Law Review* (1931), 261-289.

munities composed of Great Britain and the Dominions. Their position and mutual relation may be readily defined. *They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.*

A foreigner endeavouring to understand the true character of the British Empire by the aid of this formula alone would be tempted to think that it was devised rather to make mutual interference impossible than to make mutual cooperation easy.

Such a criticism, however, completely ignores the historic situation. The rapid evolution of the Oversea Dominions during the last fifty years has involved many complicated adjustments of old political machinery to changing conditions. The tendency towards equality of status was both right and inevitable. Geographical and other conditions made this impossible of attainment by the way of federation. The only alternative was by the way of autonomy; and along this road it has been steadily sought. Every self-governing member of the Empire is now the master of its destiny. In fact, if not always in form, it is subject to no compulsion whatever.

But no account, however accurate, of the negative relations in which Great Britain and the Dominions stand to each other can do more than express a portion of the truth. The British Empire is not founded upon negations. It depends essentially, if not formally, on positive ideals. Free institutions are its life-blood. Free cooperation is its instrument. Peace, security, and progress are among its objects. Aspects of all these great themes have been discussed at the present Conference; excellent results have been thereby obtained. And, though every Dominion is now, and must always remain, the sole judge of the nature and extent of its cooperation, no common cause will, in our opinion, be thereby imperilled.

Equality of status, so far as Britain and the Dominions are concerned, is thus the root principle governing our Inter-Imperial Relations. But the principles of equality and similarity, appropriate to *status*, do not universally extend to function. Here we require something more than immutable dogmas. For example, to deal with questions of diplomacy and questions of defence, we require also flexible machinery—machinery which can, from time to time, be adapted to the changing circumstances of the world. This subject also has occupied our attention. The rest of this Report will show how we have endeavoured not only to state political theory but to apply it to our common needs.

[Sections III-VII omitted.]

Appendix

SPECIMEN FORM OF TREATY

The President of the United States of America, His Majesty the King of the Belgians, His Majesty the King (*here insert His Majesty's full title*), His Majesty the King of Bulgaria, etc., etc.

.....
Desiring
Have resolved to conclude a treaty for that purpose and to that end have appointed as their Plenipotentiaries:
The President

.....
His Majesty the King (*title as above*):
for Great Britain and Northern Ireland and all parts of the British Empire which are not separate Members of the League (of Nations),
AB.
for the Dominion of Canada,
CD.
for the Commonwealth of Australia,
EF.
for the Dominion of New Zealand,
GH.
for the Union of South Africa,
IJ.
for the Irish Free State,
KL.
for India,
MN.

.....
who, having communicated their full powers, found in good and due form, have agreed as follows:
.....

.....
In faith whereof the above-named Plenipotentiaries have signed the present Treaty.
AB.
CD.
EF.
GH.
IJ.
KL.
MN.

(or if the territory for which each Plenipotentiary signs is to be specified:	
(for Great Britain, etc.)	AB.
(for Canada)	CD.
(for Australia)	EF.
(for New Zealand)	GH.
(for South Africa)	IJ.
(for the Irish Free State)	KL.
(for India)	MN.)

§ 14. JOINT CONTROL OF FOREIGN POLICY

The following document is a treaty entered into at the time by three independent States. QUERY: In the eyes of international law are the contracting States to be regarded thenceforth as three States or as one State?

Pact of Organisation of the Little Entente¹

League of Nations Treaty Series, No. 3213.

His Majesty the King of Yugoslavia, His Majesty the King of Roumania and the President of the Czechoslovak Republic,

Desirous of maintaining and organising peace;

Firmly determined to strengthen economic relations with all States without distinction and with the Central European States in particular,

Anxious that peace shall be safeguarded in all circumstances, that progress in the direction of the real stabilisation of conditions in Central Europe shall be assured and that the common interests of their three countries shall be respected,

Determined, with this object, to give an organic and stable basis to the relations of friendship and alliance existing between the three States of the Little Entente, and,

Convinced of the necessity of bringing about such stability on the one hand by the complete unification of their general policy and on the other by the creation of a directing organ of this common policy, namely, the group of the three States of the Little Entente, thus forming a higher international unit, open to other States under conditions to be agreed upon in each particular case,

Have resolved to establish what follows in the provisions hereunder, and

Have appointed as their Plenipotentiaries:

[Names of Plenipotentiaries omitted.]

¹ Signed at Geneva, February 16, 1933; ratifications exchanged at Prague May 30, 1933; registered with the Secretariat of the League of Nations July 4, 1933.—Ed.

Who, having submitted their full powers, have agreed on the following provisions:

ARTICLE 1. A Permanent Council of the States of the Little Entente, composed of the Ministers for Foreign Affairs of the three respective countries or of the special delegates appointed for the purpose, shall be constituted as the directing organ of the common policy of the group of the three States. Decisions of the Permanent Council shall be unanimous.

ARTICLE 2. The Permanent Council, apart from its normal intercourse through the diplomatic channel, shall be required to meet at least three times a year. One obligatory annual meeting shall be held in the three States in turn, and another shall be held at Geneva during the Assembly of the League of Nations.

ARTICLE 3. The President of the Permanent Council shall be the Minister for Foreign Affairs of the State in which the obligatory annual meeting is held. He shall take the initiative in fixing the date and the place of meeting, shall arrange its agenda and shall draw up the questions to be decided. He shall continue to be President of the Permanent Council until the first obligatory meeting of the following year.

ARTICLE 4. In all questions that may be discussed, as in all decisions that may be reached, whether in regard to the relations of the States of the Little Entente among themselves or in regard to their relations with other States, the principle of the absolute equality of the three States of the Little Entente shall be rigorously respected.

ARTICLE 5. According to the exigencies of the situation, the Permanent Council may decide that in any given question the representation or the defence of the point of view of the States of the Little Entente shall be entrusted to a single delegate or to the delegation of a single State.

ARTICLE 6. Every political treaty of any one State of the Little Entente, every unilateral act changing the existing political situation of one of the States of the Little Entente in relation to an outside State, and every economic agreement involving important political consequences shall henceforth require the unanimous consent of the Council of the Little Entente.

The existing political treaties of each State of the Little Entente with outside States shall be progressively unified as far as possible.

ARTICLE 7. An Economic Council of the States of the Little Entente shall be constituted for the progressive co-ordination of the economic interests of the three States, whether among themselves or in their relations with other States. It shall be composed of specialists and experts in economic, commercial and financial matters and shall act as an auxiliary advisory organ of the Permanent Council in regard to its general policy.

ARTICLE 8. The Permanent Council shall be empowered to establish other stable or temporary organs, commissions or committees for the purpose of studying and preparing the solution of special questions or groups of questions for the Permanent Council.

ARTICLE 9. A Secretariat of the Permanent Council shall be created. Its headquarters shall be established in each case for one year in the capital of the President in office of the Permanent Council. A section of the Secretariat shall function permanently at the seat of the League of Nations at Geneva.

ARTICLE 10. The common policy of the Permanent Council shall be inspired by the general principles embodied in all the great international instruments relating to post-war policy, such as the Covenant of the League of Nations, the Pact of Paris, the General Act of Arbitration, any Conventions concluded in regard to disarmament, and the Locarno Pacts. Furthermore, nothing in the present Pact shall be construed as contrary to the principles or provisions of the Covenant of the League of Nations.

ARTICLE 11. The Conventions of Alliance between Roumania and Czechoslovakia of April 23, 1921, between Roumania and Yugoslavia of June 7, 1921, and between Czechoslovakia and Yugoslavia of August 31, 1922, which were extended on May 21, 1929 and are supplemented by the provisions of the present Pact, as well as the Act of Conciliation, Arbitration and Judicial Settlement signed by the three States of the Little Entente at Belgrade on May 21, 1929, are hereby renewed for an indefinite period.

ARTICLE 12. The present Pact shall be ratified and the exchange of ratifications shall take place at Prague not later than the next obligatory meeting. It shall come into force on the day of the exchange of ratifications.

In faith whereof the above-named Plenipotentiaries have signed the present Pact.

Done at Geneva, in triplicate, February 16, 1933.²

(L. S.) (*Signed*) B. D. JEVTIĆ, *m. p.*

(L. S.) (*Signed*) DR. EDOUARD BENES, *m. p.*

(L. S.) (*Signed*) N. TITULESCO, *m. p.*

§ 15. UNIONS OF STATES

NOTE BY THE EDITOR

Unions of States, real and personal.—"When by a permanent arrangement two or more States are united to form a single unit for purposes of

² In 1939 the conduct of Czechoslovakian foreign relations was assumed by Germany (see § 18b, p. 72). **QUERIES:** Is Germany now bound by the above Pact of Organisation? Are Yugoslavia and Roumania bound by it towards Germany or between themselves? See Chapter VII.—ED.

international intercourse but not for all purposes, the result is said to be a *real* union. Austria-Hungary prior to 1918 presented an example of a real union.”¹

QUERY: Does the Denmark-Iceland Act of Union of 1918 create a real union? It provides:

1. Denmark and Iceland are free and sovereign States, united by a common King and by the agreement contained in this Union Act. The names of both States are included in the title of the King. 2. . . . The succession [to the Throne] cannot be altered except by the consent of both States. . . . 7. Denmark is entrusted with the safeguarding of Iceland's foreign affairs. . . . Should the Icelandic Government desire at their own expense to depute delegates to conduct negotiations respecting specific Icelandic matters, this can be done in concert with the Minister for Foreign Affairs. . . . International agreements which Denmark may conclude after this Union Act has received Royal Sanction, shall not be binding on Iceland without the sanction of the proper Icelandic authorities. . . . 19. Denmark shall notify foreign Powers that, in conformity with the contents of this Union Act, she has recognized Iceland as a sovereign State, and shall simultaneously notify that Iceland has declared herself perpetually neutral and that she has no naval flag. . . .”²

“Where two or more States merely have a common Head of State, they are said to form a *personal* union. Great Britain and Hanover from 1714 to 1837, the Netherlands and Luxemburg from 1815 to 1890, and Belgium and the Congo Free State from 1885 to 1908 may be cited as examples.”³

QUERIES: Do the present constitutional arrangements of the British Commonwealth of Nations (§ 13 above) constitute a real union? A personal union? Does the Little Entente Pact of 1931 (§ 14 above) constitute a real union? A personal union?

Federal unions.—“A real or personal union is to be distinguished from a State which in itself consists of a federal union. The United States of America has been a federal State since 1781 . . .” says Hudson, who also cites the Argentine Republic, Mexico, Switzerland, the U.S.S.R., Venezuela, Germany (1871-1934), Australia (since 1900) and Canada (since 1867) as examples of federal unions.⁴ Each of these communities conducts its own foreign relations (but see § 13 on Australia and Canada), though it is made up of parts which exercise constitutionally more or less important powers.

QUERY: Is the United States of America a real union?

In a federal union, international law in some of its aspects is applied as between the constituent parts. This is true in the United States (see § 53

¹ M. O. Hudson, *Case* (1936), 49.

² Excerpts are from excerpts as printed in Hudson, *Cases* (1936), 46.

³ *Ibid.*, p. 49.

⁴ *Ibid.*

below), and J. B. Scott, *Judicial Settlement of Controversies between States of the American Union* (1918). In *Württemberg and Prussia v. Baden* (1927), reported in *Annual Digest*, 1927-1928, 128, and in Scott and Jaeger, *Cases* (1937), 283, the German *Staatsgerichtshof* declared that "as the dispute was one of public law between States it was impossible to apply the municipal law of a single State. There were in the Constitution no provisions bearing upon the dispute. In view of this the Court was bound to apply rules of international law the applicability of which, as between members of the German Federation, must be recognised, though to a limited extent."⁵

§ 16. STATES UNDER SPECIFIC RESTRICTION: PROTECTION OF MINORITIES

a. Treaty Between the Principal Allied and Associated Powers and Czechoslovakia, 1919¹

British Treaty Series, No. 20 (1919) [Cmd. 479].

CHAPTER I

ARTICLE 1. Czecho-Slovakia undertakes that the stipulations contained in Articles 2 to 8 of this Chapter shall be recognised as fundamental laws and that no law, regulation or official action shall conflict or interfere with these stipulations, nor shall any law, regulation or official action prevail over them.

ARTICLE 2. Czecho-Slovakia undertakes to assure full and complete protection of life and liberty to all inhabitants of Czecho-Slovakia without distinction of birth, nationality, language, race or religion.

All inhabitants of Czecho-Slovakia shall be entitled to the free exercise, whether public or private, of any creed, religion or belief, whose practices are not inconsistent with public order or public morals.

ARTICLE 3. Subject to the special provisions of the Treaties mentioned below Czecho-Slovakia admits and declares to be Czecho-Slovak nationals *ipso facto* and without the requirement of any formality German, Austrian or Hungarian nationals habitually resident or possessing rights of citizenship (*pertinenza-Heimatsrecht*) as the case may be at the date of the coming into force of the present Treaty in territory which is or may be recognised as

⁵ See also M. Huber, "The Inter-Cantonal Law of Switzerland," 3 *A.J.I.L.* (1909), 62, and W. H. Moore, "Federations and Suits between Governments," 17 *Journal of Comparative Legislation and International Law* (1935), 163.

¹ Signed September 10, 1919; in force July 16, 1920; registered with Secretariat of the League of Nations October 21, 1920. The names of the plenipotentiaries are omitted.—Ed.

forming part of Czecho-Slovakia under the Treaties with Germany, Austria or Hungary respectively, or under any Treaties which may be concluded for the purpose of completing the present settlement. . . .

ARTICLE 7. All Czecho-Slovak nationals shall be equal before the law and shall enjoy the same civil and political rights without distinction as to race, language or religion.

Differences of religion, creed or confession shall not prejudice any Czecho-Slovak national in matters relating to the enjoyment of civil or political rights, as for instance admission to public employments, functions and honours, or the exercise of professions and industries.

No restriction shall be imposed on the free use by any Czecho-Slovak national of any language in private intercourse, in commerce, in religion, in the press or publications of any kind, or at public meetings.

Notwithstanding any establishment by the Czecho-Slovak Government of an official language, adequate facilities shall be given to Czecho-Slovak nationals of non-Czech speech for the use of their language, either orally or in writing, before the courts.

ARTICLE 8. Czecho-Slovak nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as the other Czecho-Slovak nationals. In particular they shall have an equal right to establish, manage and control at their own expense charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.

ARTICLE 9. Czecho-Slovakia will provide in the public educational system in towns and districts in which a considerable proportion of Czecho-Slovak nationals of other than Czech speech are residents adequate facilities for ensuring that the instruction shall be given to the children of such Czecho-Slovak nationals through the medium of their own language. This provision shall not prevent the Czecho-Slovak Government from making the teaching of the Czech language obligatory.

In towns and districts where there is a considerable proportion of Czecho-Slovak nationals belonging to racial, religious or linguistic minorities, these minorities shall be assured an equitable share in the enjoyment and application of the sums which may be provided out of public funds under the State, municipal or other budget, for educational, religious or charitable purposes.

CHAPTER II

ARTICLE 10. Czecho-Slovakia undertakes to constitute the Ruthene territory south of the Carpathians within frontiers delimited by the Principal

Allied and Associated Powers as an autonomous unit within the Czecho-Slovak State, and to accord to it the fullest degree of self-government compatible with the unity of the Czecho-Slovak State.

ARTICLE 11. The Ruthene territory south of the Carpathians shall possess a special Diet. This Diet shall have powers of legislation in all linguistic, scholastic and religious questions, in matters of local administration, and in other questions which the laws of the Czecho-Slovak State may assign to it. The Governor of the Ruthene territory shall be appointed by the President of the Czecho-Slovak Republic and shall be responsible to the Ruthene Diet.

ARTICLE 12. Czecho-Slovakia agrees that officials in the Ruthene territory will be chosen as far as possible from the inhabitants of this territory.

ARTICLE 13. Czecho-Slovakia guarantees to the Ruthene territory equitable representation in the legislative assembly of the Czecho-Slovak Republic, to which Assembly it will send deputies elected according to the constitution of the Czecho-Slovak Republic. These deputies will not, however, have the right of voting in the Czecho-Slovak Diet upon legislative questions of the same kind as those assigned to the Ruthene Diet.

ARTICLE 14. Czecho-Slovakia agrees that the stipulations of Chapters I and II so far as they affect persons belonging to racial, religious or linguistic minorities constitute obligations of international concern and shall be placed under the guarantee of the League of Nations. They shall not be modified without the assent of a majority of the Council of the League of Nations. The United States, the British Empire, France, Italy and Japan hereby agree not to withhold their assent from any modification in these Articles which is in due form assented to by a majority of the Council of the League of Nations.

Czecho-Slovakia agrees that any Member of the Council of the League of Nations shall have the right to bring to the attention of the Council any infraction, or any danger of infraction, of any of these obligations, and that the Council may thereupon take such action and give such direction as it may deem proper and effective in the circumstances.

Czecho-Slovakia further agrees that any difference of opinion as to questions of law or fact arising out of these Articles between the Czecho-Slovak Government and any one of the Principal Allied and Associated Powers, or any other Power a Member of the Council of the League of Nations, shall be held to be a dispute of an international character under Article 14 of the Covenant of the League of Nations. The Czecho-Slovak Government hereby consents that any such dispute shall, if the other party hereto demands, be referred to the Permanent Court of International Justice.

The decision of the Permanent Court shall be final and shall have the same force and effect as an award under Article 13 of the Covenant.²

[Articles 15-21, with Annexes, and the signatures, are omitted.]

b. Protection of Minorities

NOTE BY THE EDITOR

In the general settlement after the World War of 1914, a number of treaties appeared whose purpose it was to assure that the members of certain minorities—national, racial, and linguistic—should enjoy specified basic rights of life and liberty in their own States, but protected by international guarantee. Poland, Czechoslovakia, Yugoslavia, Roumania, Greece, Armenia, Austria, Bulgaria, Hungary, and Turkey each entered into such a treaty with the “Principal Allied and Associated Powers.” Although the treaty with Poland was the prototype of the others and led to a most significant series of controversies in the World Court,¹ the treaty with Czechoslovakia is reproduced above because of its recent interest. The treaties as a group are significant, among other reasons, because they set forth in an international instrument rights of individuals against the State of which they are a part; require that State to embody these rights in its constitutional law; and make controversies over these rights matters susceptible of international adjudication in the World Court. Internal matters of nationality and personal rights—customarily left to the determination of the “fully sovereign State”—thus become, by treaty, matters of international law. The situation created by the treaty above is much like that which would exist if the United States, by treaty, should agree that the Bill of Rights in the Federal Constitution would be observed as a matter of international obligation towards other States parties to the treaty, and that such States could take controversies under the treaty to the World Court without the further consent of the United States. Nevertheless, States which have assumed such obligations, though their power to deal freely with considerable portions of their populations is substantially limited, are not regarded the less as persons of international law by reason of the treaties, which do not impair their general power to conduct their own foreign relations.

² Since the absorption of Czechoslovakia by Germany in 1939, is Germany bound by the provisions of this treaty as regards the populations of Czechoslovakia? See Chapter VII.—Ed.

¹ *Publications*, P.C.I.J., Series B, No. 6 (1923); Series B, No. 7 (1923); Series A, No. 15 (1928); Series A/B, No. 40 (1931); Series A/B, Nos. 58, 60 (1933).

§ 17. STATES UNDER SPECIFIC RESTRICTION: OTHER CASES

a. Haiti. Treaty of 1915 between Haiti and the United States

See § 128 below, pages 647-650.

b. Haiti, Cuba, Panama, Monaco, Neutralized States

NOTE BY THE EDITOR

The Treaty of 1915 between the United States and Haiti left Haiti a fully sovereign State, although under the treaty Haiti agreed to important restrictions on the exercise of its treaty-making powers. Under the treaty terms, officers designated by the United States assumed practical direction of Haitian finances; Haiti agreed "not to increase its public debt except by previous agreement with the President of the United States"; not to "contract any debt or assume any financial obligation unless the ordinary revenues of the Republic available for that purpose, after defraying the expenses of the Government, shall be adequate to pay the interest and provide a sinking fund for the final discharge of such debt"; not to surrender any territory or jurisdiction over it, to any foreign Power; and not "to enter into any treaty or contract with any foreign Power or Powers that will impair or tend to impair the independence of Haiti. . . . Should the necessity occur, the United States will lend an efficient aid for the preservation of Haitian independence and the maintenance of a government adequate for the protection of life, property, and individual liberty."¹

Cuba also is a fully sovereign State, though under its Convention of 1903 with the United States, Cuba agreed not to enter into any treaty with foreign Powers "which will impair or tend to impair the independence of Cuba"; or permit foreign Powers to obtain "lodgment in or control over any portion of said island"; or contract "any public debt to pay the interests upon which, and to make reasonable sinking-fund provision for the ultimate discharge of which, the ordinary revenues of the Island of Cuba, after defraying the current expenses of the Government, shall be inadequate." Cuba agreed that the United States "may exercise the right to intervene for the preservation of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of

¹ 39 Stat. 1654; *U. S. T. S.*, No. 623.

Paris on the United States, now to be . . . undertaken by the Government of Cuba. . . ."²

In the Treaty of 1903 between the United States and Panama, Panama likewise retained its control of foreign relations, although it agreed (Article XXIV) not to permit any change in its status to affect the rights of the United States under the treaty. The treaty may be regarded as embodying (a) a guarantee of the independence of Panama by the United States; (b) a cession of the exercise of sovereign rights—but not sovereignty—in the Canal Zone ten miles wide; and (c) a grant to the United States of rights outside the zone, necessary to construct and defend the canal.³

None of the above relationships (Czechoslovakia, Haiti, Cuba, Panama) may be properly described as a *protectorate*, whose determining characteristic is the surrender of the conduct of its foreign relations by the protected community; but the terms of a treaty relationship may readily preserve for one contracting party the form of the conduct of its foreign relations, while granting to the other its substance. This is true of the obligations assumed by Monaco towards France in the treaty of July 17, 1918, in which Monaco, in return for a French guarantee of its independence, sovereignty, and territory, "as though that territory formed part of France," undertakes "to exercise its rights of sovereignty entirely in accord with the political, military, naval, and economic interests of France. . . . Measures concerning the international relations of the Principality shall always form the subject of a prior understanding between the Princely Government and the French Government . . ." and Monaco agrees "not to alienate the Principality, either wholly or in part, in favor of any Power other than France." In case the Crown of Monaco falls vacant, "the territory of Monaco shall form, under the protectorate of France, an autonomous State called the State of Monaco . . . The French Government may, either on its own initiative, with the assent of the Prince, or in an emergency, after notification, or at the request of His Serene Highness, cause to enter and remain in the territory and territorial waters of the Principality the military or naval forces required for upholding the security of the two countries."⁴

Neutralized States.—A neutralized State is one which agrees to remain permanently neutral except in its own defense, in return for a treaty guarantee by other States of its integrity. Switzerland is at present the only neutralized State, the status having begun in the Treaty of Vienna, 1815, and having been reaffirmed in the Treaty of Versailles, 1919. Switzerland entered the League of Nations only on the understanding that she would not be obliged

² 33 Stat. 2248. *Treaties of the United States*, I, 362. This treaty has now been abrogated by a treaty signed May 29, 1934 (U. S. T. S., No. 866), which came into force June 9, 1934.

³ U. S. T. S., No. 431.

⁴ 111 *State Papers*, 727, translated in Hudson, *Cases* (1936), 52-53.

under the Covenant to participate in military action or permit the passage of troops through her territory; and in 1938 the Council of the League took notice "of Switzerland's intention, based on her permanent neutrality, henceforth no longer to coöperate in any way in executing the provisions of the Covenant concerning sanctions," and declared that she would not be called upon to do so.⁵ Belgium and Luxemburg were neutralized in 1831, but after the World War of 1914 her experience with Germany led Belgium to seek release from the neutralized status. In 1936, Belgium regained a neutral, though not a neutralized, status.⁶ The former was obtained through Belgian unilateral action; the latter would have required an agreement with Belgium by other States in which they guaranteed the integrity and inviolability of Belgian territory, in exchange for maintenance by Belgium of her neutrality, except in her own defense. Neutralized States are "deprived of the right of offensive warfare" and have "not therefore that final recourse possessed by fully sovereign States for enforcing their demands," but they do not lose international competence otherwise by neutralization.⁷

In a Convention signed October 29, 1921, Finland agreed to the non-fortification and neutralization of the Åland Islands; but Finland was not "neutralized."⁸ The Philippine Islands may in the future give further importance to neutralization, since in 1934 Congress authorized the President, "at the earliest practicable date, to enter into negotiations with foreign powers with a view to the conclusion of a treaty for the perpetual neutralization of the Philippine Islands, if and when Philippine independence shall have been achieved."⁹

§ 18. DEPENDENT COMMUNITIES

a. Kelantan

In the following case the British House of Lords, sitting as a court, had to decide whether Kelantan was an independent State. QUERY: Did the judgment of the House of Lords make of Kelantan an independent State which other States (*e.g.*, the United States) could hold responsible for breeches of international law?

Duff Development Co., Ltd., *v.* Government of Kelantan

GREAT BRITAIN, HOUSE OF LORDS, 1924

[1924] A. C. 797.

APPEAL from an order of the Court of Appeal (Lord Sterndale, M. R., Warrington and Younger, L. JJ.) reversing an order of Roche, J.

⁵ See H. J. Morgenthau in 32 *A.J.I.L.* (1938), 558 ff.

⁶ See C. C. Hyde, in 31 *A.J.I.L.* (1937), 81.

⁷ G. G. Wilson, *International Law*, 9th Ed. (1935), p. 60.

⁸ See Hudson, *International Legislation*, I, 744 ff.

⁹ 48 Stat. 456, Sec. 11.

[Statement of case and arguments of counsel omitted. Only the opinion of Viscount Finlay is reproduced.]

VISCOUNT FINLAY: My Lords, the appellants are a company formed for the purpose of working concessions in Kelantan. The respondents are described as "The Government of Kelantan." The appellants held certain rights and privileges in the State of Kelantan under an agreement made with them by the Rajah of that State in 1905. This agreement was cancelled by an indenture made on July 15, 1915, between the Crown Agents for the Colonies, acting for and on behalf of the Government of Kelantan, and the appellant company, and by the same indenture grants were made of certain lands and rights in Kelantan to the company. By the twenty-first clause of the indenture all disputes relating to it were to be referred to a sole arbitrator, and this clause was to be deemed a submission to arbitration under the Arbitration Act of 1889, the provisions of which were to apply as far as applicable.

In 1919 such disputes arose, and they were referred to Sir Edwin Speed, who made his award on November 17, 1921. The Government of Kelantan moved before Russell, J., in the Chancery Division, to set aside the award on the ground of mistake in law; this motion was dismissed with costs on March 23, 1922, and Russell, J.'s decision was affirmed in the Court of Appeal on May 24, 1922, and in the House of Lords on March 22, 1923. In these proceedings the Kelantan Government raised no objection on the ground of privilege as a sovereign State, but rested their case on such grounds as are open to any party to an arbitration. They had disputed their liability before the arbitrator and they challenged the award itself when made as invalid upon legal grounds.

Before the appeal to the House of Lords just referred to, the appellant company applied to Master Bonner for an order under s. 12 of the Arbitration Act, 1889, for leave to enforce the award in the same manner as a judgment or order. On this summons two questions arose, (1.) whether the Kelantan Government is a sovereign state, and (2.) whether, if the first question were answered in the affirmative, execution could be issued against it in the Courts of this country. The Government of Kelantan did not appear on the summons before Master Bonner, and on June 21, 1922, he made an order that the appellants be at liberty to enforce the award in the same manner as a judgment or order to the same effect.

The Government of Kelantan then applied on a summons before Master Jelf for an order that the summons before Master Bonner, the alleged service of it on the Government and the order made thereon on June 21, should be set aside on the ground that the Government of Kelantan is that of a sovereign ruler. The hearing was adjourned in order that Master Jelf

might communicate with the Colonial Office. The Colonial Office sent to Master Jelf a letter dated October 9, 1922, informing him that Kelantan is an independent State in the Malay Peninsula and that the Sultan is the sovereign ruler thereof. The letter also enclosed (1) the English text of an agreement in 1902 conferring upon Siam certain rights over Kelantan; (2) a treaty between Great Britain and Siam dated March 10, 1909, transferring these rights to His Majesty's Government; and (3) an agreement between Great Britain and Kelantan dated October 22, 1910. This last agreement provided by art. 1 that Kelantan should have no relations with any foreign power except through the King of Great Britain; by art. 2 that His Majesty might appoint officers to advise the Rajah of Kelantan, and that the Rajah should follow their advice in all matters of administration other than those touching the Mohammedan religion and Malay custom, and by art. 3 that the Rajah of Kelantan should not enter into agreements concerning land, or grant or allow the transfer of any concession, in favour of any person other than a native of Kelantan, or appoint officials other than natives, without the consent of His Majesty's Government. There were also clauses providing for the raising of troops in Kelantan in certain events (art. 4); stipulations that internal administration should not be interfered with except in certain contingencies (art. 5); and provisions with reference to posts, telegraphs and railways (art. 6 and 7). Art. 8 provided that nothing in the agreement should affect the administrative authority then held by the Rajah of Kelantan, and that except as provided in the agreement the relations between the Rajah and His Majesty's Government should be the same as those which had existed between the Rajah and the Siamese Government.

With the consent of His Majesty, the Rajah of Kelantan, after the date of the last-mentioned agreement, assumed the title of Sultan of Kelantan, and is now so designated.

Master Jelf held that Kelantan is a sovereign State, and by his order dated December 12, 1922, set aside the order made by Master Bonner. Roche, J., on appeal reversed the order of Master Jelf; he was, however, himself reversed by the Court of Appeal on January 17, 1923, so that the order of Master Jelf stands good subject to the present appeal. It is from this decision of January 17 that the present appeal is brought to this House.

The first question to be determined is as to the status of Kelantan—is the Sultan a sovereign prince?

It is settled law that it is for the Court to take judicial cognizance of the status of any foreign Government. . . .

The letter of the Colonial Office is not an expression of the opinion of the official who wrote it. The first sentence is: "I am directed by Mr. Secretary Churchill to inform you in reply to your letter of 18th July that Kelantan is an independent State in the Malay Peninsula and that His

Highness Ismail . . . is the present sovereign ruler thereof." This is an official answer by the Secretary of State on behalf of the Government.

The question put was as to the status of the ruler of Kelantan. It is obvious that for sovereignty there must be a certain amount of independence, but it is not in the least necessary that for sovereignty there should be complete independence. It is quite consistent with sovereignty that the sovereign may in certain respects be dependent upon another Power; the control, for instance, of foreign affairs may be completely in the hands of a protecting Power, and there may be agreements of treaties which limit the powers of the sovereign even in internal affairs without entailing a loss of the position of a sovereign Power. In the present case it is obvious that the Sultan of Kelantan is to a great extent in the hands of His Majesty's Government. We were asked to say that it is for the Court and for this House in its judicial capacity to decide whether these restrictions were such that the Sultan had ceased to be a sovereign. We have no power to enter into any such inquiry. The reply of the Colonial Office to Master Jelf on October 9, 1922, states that Kelantan is an independent State in the Malay Peninsula and that the Sultan is the sovereign ruler, that His Majesty's Government does not exercise or claim any rights of sovereignty or jurisdiction over Kelantan, and that the Sultan makes laws, dispenses justice through Courts, and, generally speaking, exercises without question the usual attributes of sovereignty.

In the face of this statement it is hopeless to contend that the Colonial Office, by appending to its letter the agreements with Siam and with Great Britain, referred it to the Courts to decide upon these documents whether the Sultan was sovereign or not. Such an interpretation is contrary to the plain terms of the letter. Of course, the Colonial Office might have given a bald answer that the Sultan is a sovereign, but it has been the practice when there are agreements or treaties dealing with the powers of the alleged sovereign to append to the reply on the question of sovereignty copies of any documents. There are very good reasons for this practice. The department might lay itself open to serious misunderstanding if it took any other course. It might be said that there was a want of candour in merely stating the conclusion that the Power is a sovereign Power without disclosing any such limitations on the sovereignty as exist here. The contention that by appending these documents the Colonial Office remits the question to the Court to form its own opinion upon it is based on a misconception. When the letter and the documents are read together, it is clear that the Secretary of State says explicitly that the Sultan is a sovereign ruler, and the documents are appended by way of making it clear that their effect has been considered and that the Colonial Office has given all due weight to them in arriving at the conclusion that the Sultan is a sovereign prince. There is no

ground for saying that because the question involves considerations of law these must be determined by the Courts. The answer of the King, through the appropriate department, settles the matter whether it depends on fact or on law.

It is true that by the agreement of October 22, 1910, the Sultan is bound not to have relations with any foreign Power except through His Majesty the King, and to follow the advice given him by the advisers appointed by His Majesty "in all matters of administration, other than those touching the Mohammedan religion and Malay custom." But it would be idle to contend that sovereignty is destroyed by the fact that a protecting Power has charge of foreign relations, and as regards the internal affairs the exception from the obligation to be guided by the advisers appointed by His Majesty is a very large one, as it comprises all matters touching the religion and customary law of the country. The restrictions on the grant of concessions and the employment of officials in art. 3, and the provisions as to posts, telegraphs and railways in arts. 6 and 7 are quite consistent with the sovereignty of the Sultan, and so are the restrictions on the grant of concessions for the construction of railways within the State (art. 7). Art. 5 is as follows:

"His Majesty's Government undertake not to interfere with the internal administration of the State of Kelantan otherwise than as provided for in this agreement, so long as nothing is done in that State contrary to the treaty rights and obligations that His Majesty's Government have with foreign Governments, and so long as peace and order are maintained in the State of Kelantan, and it is governed for the benefit of its inhabitants with moderation, justice, and humanity."

And art. 8 provides that "nothing in this agreement shall affect the administrative authority now held by the Rajah of Kelantan," and that except as provided in the agreement the relations between the Rajah and His Majesty's Government shall be the same as those which previously existed between him and the Siamese Government.

While there are extensive limitations upon its independence, the enclosed documents do not negative the view that there is quite enough independence left to support the claim of sovereignty. But, as I have said, the question is not for us at all; it has been determined for us by His Majesty's Government, which in such matters is the appropriate authority by whose opinion the Courts of His Majesty are bound to abide. . . .

I am of opinion that this appeal should be dismissed with costs. . . .

[The opinions of Viscount Cave, Lord Sumner, and Lord Dunedin are omitted.]

LORD CARSON: My Lords, I must confess that if it was open to me to disregard the statements contained in the letter from the Secretary of State

for the Colonies, that "Kelantan is an independent State and the present Sultan is the present sovereign ruler thereof," I would find great difficulty in coming to that conclusion of fact, having regard to the terms of the documents enclosed in the letter from the Secretary of State. It is, in my opinion, difficult to find in these documents the essential attributes of independence and sovereignty in accordance with the tests laid down by the exponents of international law. It is, however, unnecessary to pursue that investigation or to examine the very ample material put before us in the arguments of Mr. Maugham, as I agree with your Lordships that the Courts of this country are bound to take judicial notice of the status of any other country in accordance with the information afforded to them by the proper representative of the Crown. . . .

Order of the Court of Appeal affirmed and appeal dismissed with costs.

b. Protectorates, Free City of Danzig, Suzerainties, Indian Tribes

NOTE BY THE EDITOR

Protectorates.—The single fact common to communities under a protectorate is that the conduct of their foreign relations is in the hands of the protecting or suzerain State, as the result of a specific treaty arrangement. The degree to which the protected community enjoys rights of internal administration is usually also determined by treaty. "It is generally recognized in international law that there is no single and uniform type of protectorate, and that each case must be taken by itself. . . ." ¹ In *Duff Development Co., Ltd., v. Government of Kelantan* above, note that the question before the House of Lords is whether the Sultan of Kelantan is a sovereign prince for the purpose of being subject to the orders of British courts, under English law. No foreign State is alleging international responsibility of the Sultan. The answer is in the affirmative, and it is based on the statement of the Colonial Office that "Kelantan is an independent State in the Malay Peninsula and that His Highness Ismail . . . is the present sovereign ruler thereof." The Court refused to go behind this statement, though the agreement of 1910 attached to the statement by the Colonial Office not only bound the Sultan not to have relations with any foreign Power except through the British King, but to follow the advice given him by British advisers "in all matters of administration, other than those touching the Mohammedan religion and Malay custom." But Viscount Finlay said, "While there are extensive limitations upon its [Kelantan's] independence, the enclosed documents do not negative the view that there

¹ Anglo-Turkish Mixed Arbitral Tribunal, in *Parounak v. Turkey*, *Annual Digest*, 1929-1930, No. 11. See also comment of the World Court in its Advisory Opinion on the Tunis-Morocco Nationality Decrees, below, pages 149 ff.

is quite enough independence left to support the claim to sovereignty. But . . . the question is not for us at all; it has been determined for us by His Majesty's Government, which in such matters is the appropriate authority by whose opinion the Courts of His Majesty are bound to abide. . . ." The House of Lords regards the relationship established as that of a protectorate; the sovereignty admitted to reside in the Sultan is, however, only for the purpose of establishing his judicial immunity. It is not a full international responsibility, which is made impossible by the provisions of the treaty of 1910.

In describing the status of the Bechuanaland, South Africa, protectorate, the English Court of Appeal stated in 1910: "What the idea of a protectorate excludes, and the idea of annexation on the other hand would include, is that absolute ownership which was signified by the word 'dominium' in Roman law, and which, though perhaps not quite satisfactorily, is described as territorial sovereignty. The protected country remains in regard to the protecting State a foreign country; and, this being so, the inhabitants of a protectorate, whether native born or immigrant settlers, do not by virtue of the relationship between the protecting and the protected State become citizens of the protecting State."²

The dissolution of Czechoslovakia in March, 1939, led to the creation of so-called "protectorates" of Germany, over Bohemia and Moravia, and over Slovakia. Neither is a protectorate in the exact sense of international law: the first, because it was not established by treaty, the second because under it Slovakia still conducts its own foreign relations.

In the case of Bohemia and Moravia, the only element of agreement involved was an engagement by the President of Czechoslovakia, never ratified by the Czechoslovakian National Assembly, to "lay the fate of the Czech people and country into the hands of the Führer of the German Reich." The present status of Bohemia and Moravia is established by a unilateral German decree of March 12, 1939,³ and may thus presumably be changed by a later unilateral decree. Under Article 6 of this decree, "the Reich takes charge of the foreign affairs of the protectorate, and in particular of the protection of its nationals in foreign countries. The Reich will conduct foreign affairs in accordance with the common interests. The protectorate is given a representative near the Reich Government, with the official designation of Minister." Under Article 3, the protectorate is declared to be autonomous, having the administration of its own affairs. "It exercises its rights of sovereignty granted it within the framework of the protectorate

² *King v. the Earl of Crewe*, L. R. (1910) 2 K. B. 576, 620. The definition occurs in the opinion of Kennedy, L. J.

³ Text in *The New York Times*, March 22, 1939, and United States Department of State, *Press Releases*, March 19, 1939.

in harmony with the political, military, and economic requirements of the Reich." The other provisions of the decree, together with its legal character, make it clear that Bohemia and Moravia are regarded as a part of Germany, with such institutions of government, and such share in the determination of internal and external policy as Germany permits. The term "protectorate" in this connection is to be regarded as a creation of German law, not as a term in international law. This perhaps explains the attitude of the United States, which declared that it did not "recognize that any legal basis exists for the status" indicated by the text of the German decree.⁴

The relationship between Germany and Slovakia is established by a treaty between them, signed March 23, 1939,⁵ which provides that the Reich will protect the independence and the territorial integrity of Slovakia (Article I), and that "military rights of sovereignty" are to be exercised by German armed forces on Slovakian territory. But, while it is provided (Article III) that "corresponding to the relationship of protection agreed upon, the Slovak Government will always conduct its policy in close cooperation with the German Government," this provision does not turn over the conduct of Slovakian foreign affairs to the Reich.

Free City of Danzig.—The legal status of the Free City of Danzig, prior to its annexation by Germany in 1939, was very complex. By Article 102 of the Treaty of Versailles, the Allied and Associated Powers agreed among themselves to establish there a free city, and to place it under the protection of the League of Nations. By Article 103, a constitution was to be elaborated for the Free City in agreement with a High Commissioner of the League of Nations, and the League was to guarantee this constitution. By Article 104, the Allied and Associated Powers agreed to negotiate a treaty, to which Poland and the Free City would be the parties, for the protection of certain Polish rights, mainly economic; and paragraph 6 of this Article stated that the treaty was to provide that the Government of Poland should undertake to conduct the foreign relations of the Free City. These provisions were all carried out, but difficulties arose from the relationship. The guarantee by the League has meant that the League's High Commissioner has been required to decide difficult questions as to the meaning.⁶ The World Court was called upon for an advisory opinion by the League Council on the question whether the special status of the Free City was such as to enable it to become a Member of the International Labor Organization. The court answered in the negative.⁷ Possibly the best de-

⁴ Acting Secretary of State to Chargé d'Affaires *ad interim* of Germany; text in *The New York Times*, March 22, 1939.

⁵ Text in *The New York Times*, March 24, 1939.

⁶ See, for example, Decisions of High Commissioner (1921), 70, reprinted in Hudson, *Cases*, 50.

⁷ *Publications*, P.C.I.J., Series B, No. 18 (1930).

scription of the Free City was to call it a protectorate of Poland under supervision of the League of Nations.⁸

Suzerainty.—G. G. Wilson says: "As distinct from a state under a protectorate which possesses all competence in international affairs which it has not specifically resigned, a state under *suzerainty* possesses only such competence as has been conferred upon it by the suzerain." He cites, among others, the example of Bulgaria, which in the Treaty of Berlin of 1878 was made a tributary and autonomous principality under the suzerainty of the Sultan of Turkey.⁹ The principal judicial decision discussing suzerainty is that of *Statham v. Statham and His Highness the Gaekwar of Baroda* (1911), Law Reports [1912] p. 92. In that case the Court struck out the name of the Gaekwar as co-respondent in a divorce case on the ground that a certificate from the Indian Office established his status as that of a sovereign Prince. The certificate describes a relationship not different in its essentials from that regarded as a protectorate in *Duff Development Co. v. Kelantan*, except that the Gaekwar is treated "as falling within the class referred to in the Interpretation Act, 1889, section 18, sub-section 5, as that of native princes or chiefs under the suzerainty of His Majesty." Thus suzerainty in this instance seems to be merely a creature of English statute. The court does not contribute materially to a distinction between a protectorate and a community under suzerainty, by saying that "'suzerainty' is a term applied to certain international relations between two sovereign states whereby one, whilst retaining a more or less limited sovereignty, acknowledges the supremacy of the other," but the next statement is clearer and supports the distinction Wilson makes: "Such a relation may be either in the nature of a fief, or conventional, *i. e.*, by some treaty of peace or alliance in contrast with the fief, which is a sovereignty granted by a lord paramount over some defined territory accompanied with an express grant of jurisdiction." In feudal law a suzerain was a lord with authority over vassals who owed him allegiance in return for the use of land. The tendency among publicists is to attach little importance to the status. Thus F. T. Gray's Pitt Cobbett says of suzerainty, that "having regard to its various applications in practice, it would scarcely seem to imply any definite relation in law; whilst the question of capacity would appear to depend on the facts of each particular case."¹⁰

Indian tribes.—G. G. Wilson regards the position of the United States relative to the Indian tribes as one of "absolute suzerainty."¹¹ Following is the language of Chief Justice Marshall denying that the Cherokee Nation,

⁸ Cf. I. F. D. Morrow, in 18 *B.L.I.L.* (1937), 114.

⁹ *International Law*, 9th Ed. (1935), 62, 63.

¹⁰ *Cases*, 5th Ed., I, 55.

¹¹ *Loc. cit.*

with which the United States had made many treaties, could sue in the Federal Supreme Court as a "foreign State" under the Constitution:

Though the Indians are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted, whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile, they are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian. . . . They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.¹²

Since 1871 the United States may not contract by treaty with Indian tribes.¹³ In 1926 an Anglo-American Claims Arbitration Tribunal awarded \$100,000 to Great Britain on behalf of a part of the Cayuga Indians who had migrated to Canada. The State of New York had paid the full amount owing under the treaties between the Cayuga Nation and the State, to the Cayugas remaining in the United States, at any rate after 1811. The Cayuga Nation as a legal unit, thought the Tribunal, "was a legal unit of New York law"; consequently, New York could decide to whom payments should be made. This did not prevent Great Britain, however, from presenting a claim on behalf of the Canadian Cayugas, since they had established themselves on British soil; especially since the Tribunal was to judge according to the "principles of international law and equity." The Tribunal thought the *equitable* claim of the Canadian Cayugas was especially strong. The Canadian Cayugas had only the status which Great Britain chose to give them. "Legally they could do nothing except under the guardianship of some sovereign. . . . New York continued to deal with the New York Cayugas as a 'nation.' Great Britain dealt with the Canadian Cayugas as individuals." If the courts might look behind the fictitious legal entity of a corporation to the individuals composing it, where equity and legal policy were to be served, the Tribunal might do so here. "These considerations are even more cogent where we are dealing with the Indians in a state of pupilage toward the sovereign with whom they were treating."¹⁴ The result of this arbitra-

¹² *Cherokee Nation v. Georgia* (1831) 5 Peters (U. S.) 1, 17.

¹³ 16 Stat. 566.

¹⁴ Nielsen's *Report*, American and British Claims Arbitration (1926), 307, at 310-314.

tion seems to be that it places the seal of an international tribunal upon the description of the status of an Indian tribe given in *Cherokee Nation v. Georgia*, but remedies the injustice caused by this status by the application of principles of justice ("equity") not required by a strict application of law.

§ 19. MANDATES

The system of Mandates, set up in Articles 22 and 23 of the League Covenant, was established in order to avoid outright annexation by the Allied and Associated Powers of various territories lost by the Central Powers as a result of the war, and in order to afford the administration of these territories some degree of international supervision. The defeated States renounced their sovereignty over their various colonial possessions in favor of the Principal Allied and Associated Powers. Subsequently these Powers assigned specific territories to specific Powers, "for the purpose of giving effect to Article 22 of the Covenant," and notified these assignments and their acceptance by the Mandatory Powers to the Council of the League. Then, in accord with the provision of Article 22 of the Covenant that the degree of authority, control or administration to be exercised by the mandatory not having been previously agreed upon by the Members of the League shall be explicitly defined by the Council of the League of Nations, the Council "confirmed" the terms of the Mandate instrument which had been agreed upon in advance by the Mandatory Power selected and the Principal Allied and Associated Powers, and presented to the Council for its approval.

The texts of Articles 22 and 23 of the League Covenant and the terms of the Mandate for Palestine printed below should be read together. Palestine is administered under an "A" Mandate.

a. Covenant of the League of Nations, Articles 22, 23

See § 115 below, pages 567-569.

b. Mandate for Palestine ¹

League of Nations Document, C. 529. M. 314. 1922. VI.

The Council of the League of Nations:

Whereas the Principal Allied Powers have agreed, for the purpose of giving effect to the provisions of Article 22 of the Covenant of the League of Nations, to entrust to a Mandatory selected by the said Powers the administration of the territory of Palestine, which formerly belonged to the Turkish Empire, within such boundaries as may be fixed by them; and

Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally

¹ Confirmed at London, July 24, 1922. In force, September 29, 1923.

made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country; and

Whereas recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country; and

Whereas the Principal Allied Powers have selected His Britannic Majesty as the Mandatory for Palestine; and

Whereas the mandate in respect of Palestine has been formulated in the following terms and submitted to the Council of the League for approval; and

Whereas His Britannic Majesty has accepted the mandate in respect of Palestine and undertaken to exercise it on behalf of the League of Nations in conformity with the following provisions; and

Whereas by the afore-mentioned Article 22 (paragraph 8) it is provided that the degree of authority, control or administration to be exercised by the Mandatory, not having been previously agreed upon by the Members of the League, shall be explicitly defined by the Council of the League of Nations:

Confirming the said mandate, defines its terms as follows:

ARTICLE 1. The Mandatory shall have full powers of legislation and of administration, save as they may be limited by the terms of this mandate.

ARTICLE 2. The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.

ARTICLE 3. The Mandatory shall, so far as circumstances permit, encourage local autonomy.

ARTICLE 4. An appropriate Jewish agency shall be recognised as a public body for the purpose of advising and co-operating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the Jewish national home and the interests of the Jewish population in Palestine, and, subject always to the control of the Administration, to assist and take part in the development of the country.

The Zionist organisation, so long as its organisation and constitution are in the opinion of the Mandatory appropriate, shall be recognised as such agency. It shall take steps in consultation with His Britannic Majesty's Gov-

ernment to secure the co-operation of all Jews who are willing to assist in the establishment of the Jewish national home.

ARTICLE 5. The Mandatory shall be responsible for seeing that no Palestine territory shall be ceded or leased to, or in any way placed under the control of, the Government of any foreign Power.

ARTICLE 6. The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes.

ARTICLE 7. The Administration of Palestine shall be responsible for enacting a nationality law. There shall be included in this law provisions framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine.

ARTICLE 8. The privileges and immunities of foreigners, including the benefits of consular jurisdiction and protection as formerly enjoyed by capitulation or usage in the Ottoman Empire, shall not be applicable in Palestine.

Unless the Powers whose nationals enjoyed the afore-mentioned privileges and immunities on August 1st, 1914, shall have previously renounced the right to their re-establishment, or shall have agreed to their non-application for a specified period, these privileges and immunities shall, at the expiration of the mandate, be immediately re-established in their entirety or with such modifications as may have been agreed upon between the Powers concerned.

ARTICLE 9. The Mandatory shall be responsible for seeing that the judicial system established in Palestine shall assure to foreigners, as well as to natives, a complete guarantee of their rights.

Respect for the personal status of the various peoples and communities and for their religious interests shall be fully guaranteed. In particular, the control and administration of Wakfs shall be exercised in accordance with religious law and the dispositions of the founders.

ARTICLE 10. Pending the making of special extradition agreements relating to Palestine, the extradition treaties in force between the Mandatory and other foreign Powers shall apply to Palestine.

ARTICLE 11. The Administration of Palestine shall take all necessary measures to safeguard the interests of the community in connection with the development of the country, and, subject to any international obligations accepted by the Mandatory, shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein.

It shall introduce a land system appropriate to the needs of the country, having regard, among other things, to the desirability of promoting the close settlement and intensive cultivation of the land.

The Administration may arrange with the Jewish agency mentioned in Article 4 to construct or operate, upon fair and equitable terms, any public works, services and utilities, and to develop any of the natural resources of the country, in so far as these matters are not directly undertaken by the Administration. Any such arrangements shall provide that no profits distributed by such agency, directly or indirectly, shall exceed a reasonable rate of interest on the capital, and any further profits shall be utilised by it for the benefit of the country in a manner approved by the Administration.

ARTICLE 12. The Mandatory shall be entrusted with the control of the foreign relations of Palestine and the right to issue exequaturs to consuls appointed by foreign Powers. He shall also be entitled to afford diplomatic and consular protection to citizens of Palestine when outside its territorial limits.

ARTICLE 13. All responsibility in connection with the Holy Places and religious buildings or sites in Palestine, including that of preserving existing rights and of securing free access to the Holy Places, religious buildings and sites and the free exercise of worship, while ensuring the requirements of public order and decorum, is assumed by the Mandatory, who shall be responsible solely to the League of Nations in all matters connected herewith, provided that nothing in this article shall prevent the Mandatory from entering into such arrangements as he may deem reasonable with the Administration for the purpose of carrying the provisions of this article into effect; and provided also that nothing in this mandate shall be construed as conferring upon the Mandatory authority to interfere with the fabric or the management of purely Moslem sacred shrines, the immunities of which are guaranteed.

ARTICLE 14. A special Commission shall be appointed by the Mandatory to study, define and determine the rights and claims in connection with the Holy Places and the rights and claims relating to the different religious communities in Palestine. The method of nomination, the composition and the functions of this Commission shall be submitted to the Council of the League for its approval, and the Commission shall not be appointed or enter upon its functions without the approval of the Council.

ARTICLE 15. The Mandatory shall see that complete freedom of conscience and the free exercise of all forms of worship, subject only to the maintenance of public order and morals, are ensured to all. No discrimination of any kind shall be made between the inhabitants of Palestine on the ground of race, religion or language. No person shall be excluded from Palestine on the sole ground of his religious belief.

The right of each community to maintain its own schools for the educa-

tion of its own members in its own language, while conforming to such educational requirements of a general nature as the Administration may impose, shall not be denied or impaired.

ARTICLE 16. The Mandatory shall be responsible for exercising such supervision over religious or eleemosynary bodies of all faiths in Palestine as may be required for the maintenance of public order and good government. Subject to such supervision, no measures shall be taken in Palestine to obstruct or interfere with the enterprise of such bodies or to discriminate against any representative or member of them on the ground of his religion or nationality.

ARTICLE 17. The Administration of Palestine may organise on a voluntary basis the forces necessary for the preservation of peace and order, and also for the defence of the country, subject, however, to the supervision of the Mandatory, but shall not use them for purposes other than those above specified save with the consent of the Mandatory. Except for such purposes, no military, naval or air forces shall be raised or maintained by the Administration of Palestine.

Nothing in this article shall preclude the Administration of Palestine from contributing to the cost of the maintenance of the forces of the Mandatory in Palestine.

The Mandatory shall be entitled at all times to use the road, railways and ports of Palestine for the movement of armed forces and the carriage of fuel and supplies.

ARTICLE 18. The Mandatory shall see that there is no discrimination in Palestine against the nationals of any State Member of the League of Nations (including companies incorporated under its laws) as compared with those of the Mandatory or of any foreign State in matters concerning taxation, commerce or navigation, the exercise of industries or professions, or in the treatment of merchant vessels or civil aircraft. Similarly, there shall be no discrimination in Palestine against goods originating in or destined for any of the said States, and there shall be freedom of transit under equitable conditions across the mandated area.

Subject as aforesaid and to the other provisions of this mandate, the Administration of Palestine may, on the advice of the Mandatory, impose such taxes and customs duties as it may consider necessary, and take such steps as it may think best to promote the development of the natural resources of the country and to safeguard the interests of the population. It may also, on the advice of the Mandatory, conclude a special customs agreement with any State the territory of which in 1914 was wholly included in Asiatic Turkey or Arabia.

ARTICLE 19. The Mandatory shall adhere on behalf of the Administration of Palestine to any general international conventions already existing, or

which may be concluded hereafter with the approval of the League of Nations, respecting the slave traffic, the traffic in arms and ammunition, or the traffic in drugs, or relating to commercial equality, freedom of transit and navigation, aerial navigation and postal, telegraphic and wireless communication or literary, artistic or industrial property.

ARTICLE 20. The Mandatory shall co-operate on behalf of the Administration of Palestine, so far as religious, social and other conditions may permit, in the execution of any common policy adopted by the League of Nations for preventing and combating disease, including diseases of plants and animals.

ARTICLE 21. The Mandatory shall secure the enactment within twelve months from this date, and shall ensure the execution of a Law of Antiquities based on the following rules. This law shall ensure equality of treatment in the matter of excavations and archaeological research to the nationals of all States Members of the League of Nations.

(1) "Antiquity" means any construction or any product of human activity earlier than the year 1700 A.D.

(2) The law for the protection of antiquities shall proceed by encouragement rather than by threat.

Any person who, having discovered an antiquity without being furnished with the authorisation referred to in paragraph 5, reports the same to an official of the competent Department, shall be rewarded according to the value of the discovery.

(3) No antiquity may be disposed of except to the competent Department, unless this Department renounces the acquisition of any such antiquity.

No antiquity may leave the country without an export licence from the said Department.

(4) Any person who maliciously or negligently destroys or damages an antiquity shall be liable to a penalty to be fixed.

(5) No cleaning of ground or digging with the object of finding antiquities shall be permitted, under penalty of fine, except to persons authorised by the competent Department.

(6) Equitable terms shall be fixed for expropriation, temporary or permanent, of lands which might be of historical or archaeological interest.

(7) Authorisation to excavate shall only be granted to persons who show sufficient guarantees of archaeological experience. The Administration of Palestine shall not, in granting these authorisations, act in such a way as to exclude scholars of any nation without good grounds.

(8) The proceeds of excavations may be divided between the excavator and the competent Department in a proportion fixed by that Department.

If division seems impossible for scientific reasons, the excavator shall receive a fair indemnity in lieu of a part of the find.

ARTICLE 22. English, Arabic and Hebrew shall be the official languages of Palestine. Any statement or inscription in Arabic on stamps or money in Palestine shall be repeated in Hebrew and any statement or inscription in Hebrew shall be repeated in Arabic.

ARTICLE 23. The Administration of Palestine shall recognise the holy days of the respective communities in Palestine as legal days of rest for the members of such communities.

ARTICLE 24. The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council as to the measures taken during the year to carry out the provisions of the mandate. Copies of all laws and regulations promulgated or issued during the year shall be communicated with the report.

ARTICLE 25. In the territories lying between the Jordan and the eastern boundary of Palestine as ultimately determined, the Mandatory shall be entitled, with the consent of the Council of the League of Nations, to postpone or withhold application of such provisions of this mandate as he may consider inapplicable to the existing local conditions, and to make such provision for the administration of the territories as he may consider suitable to those conditions, provided that no action shall be taken which is inconsistent with the provisions of Articles 15, 16 and 18.

ARTICLE 26. The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

ARTICLE 27. The consent of the Council of the League of Nations is required for any modification of the terms of this mandate.

ARTICLE 28. In the event of the termination of the mandate hereby conferred upon the Mandatory, the Council of the League of Nations shall make such arrangements as may be deemed necessary for safeguarding in perpetuity, under guarantee of the League, the rights secured by Articles 13 and 14, and shall use its influence for securing, under the guarantee of the League, that the Government of Palestine will fully honour the financial obligations legitimately incurred by the Administration of Palestine during the period of the mandate, including the rights of public servants to pensions or gratuities.

The present instrument shall be deposited in original in the archives of the League of Nations and certified copies shall be forwarded by

the Secretary-General of the League of Nations to all Members of the League.

Done at London the twenty-fourth day of July, one thousand nine hundred and twenty-two.

§ 20. SPHERES OF INFLUENCE

The discussion in this chapter has been based mainly on relationships established by international agreements to which the political communities most concerned are themselves parties. The *sphere of influence*, or *sphere of interest*, however, is typically a legal situation in which States A and B agree between themselves as to their respective "rights" in matters within the existing territorial jurisdiction of State C. State C is not a party and acquires no rights and obligations; in fact, it may regard the arrangement as entirely contrary to its rights and interests. The sphere of influence or interest was used by European Powers to apportion among themselves in advance of conquest, and in territories still under native sovereignty as a matter of law, various "rights" of an economic and political character, particularly in backward regions like Africa. It was supposed that such arrangements had fallen into disrepute, but the controversy over Ethiopia indicated that they had not. In that controversy, all the States parties to the sphere of influence arrangement printed below—France, Great Britain, and Italy—attached great importance to it.

In 1906 France joined Great Britain and Italy in this Agreement respecting Abyssinia. Abyssinia was not a party, though the draft was communicated to Emperor Menelik before signature. In defining the *status quo* which the parties agreed to maintain, Article I of the Agreement listed existing treaties of the parties with and concerning Abyssinia. It was thus brought into clear relief that France, Great Britain, and Italy, in addition to having signed treaties individually with Abyssinia, had made previous arrangements with each other concerning Abyssinian territory. Thus Great Britain, in addition to the two Protocols with Italy mentioned above, had an agreement with France, and France had agreements with Italy and Great Britain. The Agreement of 1906 was an attempt to state the *status quo*, and on the basis of the *status quo* to make arrangements among the parties as to their future rights in Abyssinia.

In 1920, Great Britain, France, and Italy became Original Members of the League of Nations. Article X of the League Covenant provides: "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled." In 1920 Abyssinia was not a Member of the League, and hence was not entitled to the protection of this Article; but in 1923 Abyssinia was unanimously admitted to Membership in the League, all the parties to the Agreement of 1906 voting to admit her. Thus Abyssinia was entitled to the benefits of Article X in 1935.

The United Kingdom and Italy exchanged notes in December, 1925, regarding mutual support of each other's interests in Ethiopia; and France and Italy

signed an agreement January 7, 1935, defining French economic interests in Ethiopia.

The conquest and annexation of the whole of Ethiopia by Italy, and the recognition of the conquest by the Powers, including France and Great Britain (1938) created a new legal situation requiring new treaty arrangements. Consult W. B. Stern, "Treaty Background of the Italo-Ethiopian Dispute," 30 *A.J.I.L.* (1936), 189 ff.

Agreement between Great Britain, France, and Italy Respecting Abyssinia Signed at London, 13th December, 1906

Translation from Hertslet, *Map of Africa by Treaty* (1909), II, 440-444.

It being the common interest of France, Great Britain, and Italy to maintain intact the integrity of Ethiopia, to provide for every kind of disturbance in the political conditions of the Ethiopian Empire, to come to a mutual understanding in regard to their attitude in the event of any change in the situation arising in Ethiopia, and to prevent the action of the three States in protecting their respective interests, both in the British, French, and Italian possessions bordering on Ethiopia and in Ethiopia itself, resulting in injury to the interests of any of them, the Government of the French Republic, the Government of His Britannic Majesty, and the Government of Italy have assented to the following Agreement:—

MAINTENANCE OF STATUS QUO IN ETHIOPIA

ART. I. France, Great Britain, and Italy shall co-operate in maintaining the political and territorial *status quo* in Ethiopia as determined by the state of affairs at present existing, and by the following Agreements—

(a) The Anglo-Italian Protocols of the 24th March and 15th April, 1891, and of 5th May, 1894, and the subsequent Agreements modifying them, including the reserves formulated by the French Government in 1894 and 1895;

(b) The Anglo-Ethiopian Convention of 14th May, 1897, and its annexes;

(c) The Italo-Ethiopian Treaty of 10th July, 1900;

(d) The Anglo-Ethiopian Treaty of 15th May, 1902;

(e) The note annexed to the above-mentioned Treaty of 15th May, 1902;

(f) The Convention of 11th March, 1862, between France and the Dannakils;

(g) The Anglo-French Agreement of 2nd-9th February, 1888;

(h) The Franco-Italian Protocols of 24th January, 1900, and 10th July, 1901, for the delimitation of the French and Italian possessions on the littoral of the Red Sea and the Gulf of Aden;

(j) The Franco-Ethiopian Frontier Convention of 20th March, 1897.

It is understood that the various Conventions mentioned in this Article do not in any way infringe the sovereign rights of the Emperor of Abyssinia, and in no respect modify the relations between the three Powers and the Ethiopian Empire as stipulated in the present Agreement.

GRANT OF CONCESSIONS

ART. II. As regards demands for agricultural, commercial, and industrial concessions in Ethiopia, the three Powers undertake to instruct their Representatives to act in such a way that concessions which may be accorded in the interest of one of the three States may not be injurious to the interests of the two others.

NON-INTERVENTION IN INTERNAL AFFAIRS

ART. III. In the event of rivalries or internal changes in Ethiopia, the Representatives of France, Great Britain, and Italy shall observe a neutral attitude, abstaining from all intervention in the internal affairs of the country, and confining themselves to such action as may be, by common consent, considered necessary for the protection of the Legations, of the lives and property of foreigners, and of the common interests of the three Powers. In no case shall one of the three Governments interfere in any manner whatsoever, except in agreement with the other two.

MAINTENANCE OF INTEGRITY OF ETHIOPIA

ART. IV. In the event of the *status quo* laid down in Art. I being disturbed, France, Great Britain, and Italy shall make every effort to preserve the integrity of Ethiopia. In any case, they shall concert together, on the basis of the Agreements enumerated in the above-mentioned Article, in order to safeguard:—

(a) The interests of Great Britain and Egypt in the Nile Basin, more especially as regards the regulation of the waters of that river and its tributaries (due consideration being paid to local interests), without prejudice to Italian interests mentioned in paragraph (b);

(b) The interests of Italy in Ethiopia as regards Erythraea and Somaliland (including the Benadir), more especially with reference to the hinterland of her possessions and the territorial connection between them to the west of Adis Abeba;

(c) The interests of France in Ethiopia as regards the French Protectorate on the Somali Coast, the hinterland of this Protectorate and the zone necessary for the construction and working of the railway from Jibuti to Adis Abeba.

RAILWAY CONCESSIONS

ART. V. The French Government communicates to the British and Italian Governments—

(1) The Concession of the Franco-Ethiopian Railway of 9th March, 1894;

(2) A communication from the Emperor Menelek dated 8th August, 1904, the translation of which is annexed to the present Agreement inviting the Company to whom the above Concession was granted to construct the second section of the line from Diré Dawa to Adis Abeba.¹

JIBUTI RAILWAY

ART. VI. The three Governments agree that the Jibuti Railway shall be prolonged from Diré Dawa to Adis Abeba, with a branch line to Harrar eventually, either by the Ethiopian Railway Company in virtue of the deeds enumerated in the preceding Article, or by any other private French Company which may be substituted therefor, with the consent of the French Government, on condition that the nationals of the three countries shall enjoy in all matters of trade and transit absolute equality of treatment on the railway and in the port of Jibuti. Goods shall not be subject to any fiscal transit duty levied for the benefit of the French Colony or Treasury.

ART. VII. The French Government will endeavor to arrange that an English, an Italian, and an Abyssinian Representative shall be appointed to the Board of the French Company or Companies which may be intrusted with the construction and working of the railway from Jibuti to Adis Abeba. The British and Italian Governments will reciprocally endeavour to arrange that a French Director shall in like manner and on the same conditions be appointed to the Board of any English or Italian Company which has been or may be formed for the construction or working of railways running from any point in Abyssinia to any point in the adjoining English or Italian territory. It is likewise agreed that the nationals of the three countries shall enjoy in all matters of trade and transit absolute equality of treatment both on the railways which may be constructed by English or Italian Companies, and in the English or Italian ports from which these railways may start. Goods shall not be subject to any fiscal transit duty levied for the benefit of the British or Italian Colonies or Treasuries.

The three Signatory Powers agree to extend to the nationals of all other countries the benefit of the provisions of Arts. VI and VII relating to equality of treatment as regards trade and transit.

ART. VIII. The French Government will abstain from all interference as regards the Concession previously granted beyond Adis Abeba.

¹ [This communication is not printed.]

RAILWAY WEST OF ADIS ABEBA TO BE CARRIED OUT UNDER AUSPICES OF
GREAT BRITAIN

ART. IX. The three Governments are agreed that all railway construction in Abyssinia west of Adis Abeba shall, in so far as foreign assistance is required, be carried out under the auspices of Great Britain. The three Governments are also agreed that all construction of railways in Ethiopia, joining the Benadir to Erythraea to the west of Adis Abeba, shall, in so far as foreign assistance is required, be carried out under the auspices of Italy.

RAILWAY FROM BRITISH SOMALILAND THROUGH ETHIOPIA TO SOUDAN

The Government of His Britannic Majesty reserve to themselves the right, in case of need, to make use of the authorization, granted by the Emperor Menelek on the 28th August, 1904, to construct a railway from British Somaliland through Ethiopia to the Soudanese frontier, on condition, however, that they previously come to an agreement with the French and Italian Governments, the three Governments undertaking not to construct without previous agreement any line entering Abyssinian territory or intended to join the Abyssinian lines, which would compete directly with those established under the auspices of any one of them.

ART. X. The Representatives of the three Powers will keep each other fully informed, and will co-operate for the protection of their respective interests. In the event of the British, French, and Italian Representatives being unable to agree, they will refer to their respective Governments, suspending all action meanwhile.

ART. XI. Beyond the Agreements enumerated in Arts. I and V of the present Convention, no Agreement concluded by any one of the Contracting Powers concerning Ethiopia shall affect the other Signatory Powers of the present Agreement.

Done at London, 13th December, 1906.

E. GREY
PAUL CAMBON
A. DE SAN GIULIANO

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QUESTIONS AND PROBLEMS

Students are urged to read all the materials in the chapter before attempting to answer the questions and problems.

1. What is meant by a fully sovereign State? Give examples. How does such a State differ from a partly sovereign State? Give examples of partly sovereign States.
2. Is every Member of the League of Nations a fully sovereign State? Give examples of Members which are fully sovereign, and, if you think there are such, examples of Members which are only partly sovereign. If you are in doubt as to whether any Member of the League of Nations is fully sovereign, how would you find out? Where would you be able to find the pertinent information?
3. Are all fully sovereign States Members of the League of Nations? Can you suggest fully sovereign States which are not Members? If there are such, does this fact make them less fully sovereign? More fully sovereign?
4. What are the qualifications which political communities who desire membership in the League of Nations must fulfill? Must they be fully sovereign States? Who determines whether these qualifications have been met? Does a fully sovereign State which is once a Member cease to be a Member when it ceases to fulfill these qualifications?

5. Would Germany be admitted to League Membership if it sought admission now for the first time? Italy? The Soviet Union? Turkey? Would answers to these questions based on the terms of the Covenant of the League differ from answers based on practical and common-sense considerations?

6. Armenia, Lichtenstein, and Monaco, among others, sought membership in the League and were refused it. Can you suggest why? (See Manley O. Hudson, "Membership in the League of Nations," 18 *A.J.I.L.*, 426.) Could the Free City of Danzig become a Member? (See *Publications*, P.C.I.J., Series B, No. 18, "Free City of Danzig and International Labor Organization.")

7. Is the League of Nations a person in international law?

8. To judge from § 13, is the Dominion of Canada a fully sovereign State? Could the Dominion of Canada make a treaty with the United States independently of Great Britain and Northern Ireland? With the Union of South Africa? What is the link, if any, between the Dominion of Canada and the Kingdom of Great Britain and Northern Ireland? Would it be legally possible for the government of His Majesty George VI in the Dominion of Canada to declare war on the government of His Majesty George VI in the United Kingdom of Great Britain and Northern Ireland? Is there any difference between the expressions "British Empire" and "British Commonwealth of Nations?"

9. In the Little Entente Pact (§ 14), which States are the signatories? From the point of view of international law, do the signatory States constitute one State, or do they remain three States? What is the precise purpose of the Pact—i. e., what does each of the States give up which it possessed before the Pact?

After the signature of this Pact, if you were the Russian Commissar for Foreign Affairs and wished to enter into a treaty with Yugoslavia, how would you proceed?

Would a treaty between Russia and Yugoslavia bind the other States parties to the Pact?

10. Is Haiti a fully sovereign State under international law?

11. Where was the case of *Duff Development Co. v. Kelantan* decided (§ 18a)? What were the facts in the case? How did these facts give rise to a question of international law? State this question as accurately as you can. What did the court decide as to this question? How did the court arrive at its conclusion? Were there any documents before the court which were of decisive importance? Describe the status of the Government of Kelantan as seen by the court. Read one or both of the following cases: *Luther v. Sagor* (§ 30), *The Prize Cases* (§ 139). What are the questions of international law in these cases? Can you see any similarity between these cases and *Duff Development Co. v. Kelantan* as to the *method* by which the courts reach their conclusions? Can you suggest any reasons for this similarity?

12. How does the Agreement of 1906 Respecting Abyssinia (§ 20) differ from the Convention between the United States and Haiti (§ 128, p. 647), as respects the States signatory to the Agreement? Is Haiti bound by the Convention? Is Abyssinia (Ethiopia) bound by the Agreement? Just what is the legal status of the Agreement, as regards the rights of (a) Great Britain, (b) France, (c) Italy, (d) Abyssinia, (e) Germany?

Compare Articles I and IV of the Agreement with Article XI of the Convention between the United States and Haiti. Resemblances? Differences? If

State X attacked Abyssinia, do any obligations arise among the signatories? If Italy attacked Abyssinia, are any provisions of this Agreement involved?

Assuming that the Agreement exemplifies a sphere of influence, how would you define a sphere of influence?

13. Discuss the following phenomena in terms of the Agreement of 1906 (§ 20): (a) Italian forces occupy one shore of Lake Tana, source of the headwaters of the Blue Nile. The Italian press announces that while British rights to the waters will be respected, Great Britain must similarly respect Italian territorial claims. (b) The Italian Government, after military conquest, announces the annexation of Abyssinia.

14. Read carefully Article 10 of the Covenant of the League of Nations (§ 115, p. 562). What does this seem to mean when read by itself? Then interpret Article 10 in terms of the Agreement of 1906, remembering that the Covenant entered into force after the Agreement. Do the words of Article 10, "Territorial integrity and existing political independence," assume any new meaning? In general, what do you think is the relation between Article 10 and the Agreement?

15. What is a Mandate under the League of Nations? Judging from § 115, how many types of Mandates are there? What are the differences between these types? Give examples of territories administered under each of the types. Is it intended that the status of a Mandate shall be permanent? How was it determined what States should administer each Mandate?

16. From a perusal of Article 22 of the League Covenant (§ 115) and the Preamble of the Mandate for Palestine (§ 19b), list the steps in the procedure followed in establishing a Mandate. What is the legal character of the Mandate for Palestine? Who are parties to it?

In the Mandate for Palestine what is meant by the term "Mandatory?" What are the general powers of the Mandatory? Are these broad or limited? Make a list of things the Mandatory is required to do, and a similar list of things the Mandatory may not do. Is the Mandatory responsible to any other State or States for the carrying out of the terms of the Mandate? Is the judgment of the Mandatory final as to the interpretation of its obligations? Is any regular procedure provided for interpretation?

17. Under the terms of the Mandate for Palestine (§ 19b), what is the established procedure for dealing with the following situations:

(a) A French national is held in jail six months without hearing the charges against him and without trial.

(b) A tariff law excludes Japanese goods from entering Palestine.

(c) A law excludes Arabs from Jewish schools.

(d) The United States desires the return of a person who, having committed murder in the United States, has fled to Jerusalem.

(e) A Greek corporation desires a concession giving it the exclusive right to construct and operate public utilities in Jerusalem.

(f) The British Government desires to cede Palestine to Germany.

(g) A dispute arises between the Arabs and the Zionist Organization relative to legislation as to land ownership.

(h) The Mandatory enforces tax legislation which discriminates against the Arabs in favor of Jews and Christians.

(i) Italy attacks Palestine.

(j) The Government of Palestine repudiates its bonds, some of which are held by American citizens resident in the United States.

(k) In order to prevent civil war, the Palestine Government excludes Christians from Jerusalem, Bethlehem, and Nazareth.

18. Japan withdrew from the League of Nations, effective 1935. What should be the legal disposition of the islands in the Pacific administered by Japan under Mandate from the League? Does Japan assume full sovereignty over them? Does Japan continue to administer them under the Mandate? Do the islands themselves become fully sovereign? Does the League of Nations assume sovereignty? Are there any other possibilities? See L. H. Evans, "Would Japanese Withdrawal from the League Affect the Status of the Japanese Mandate?" 27 *A.J.I.L.* (January, 1933), 140. Find out what did happen.

19. Write an essay on the development of the international status of Iraq since 1919.

20. Find and summarize the important documents determining the international status of the following:

Abyssinia
Santo Domingo
Egypt
The Irish Free State
Arizona
Manchukuo
Ruanda-Urundi
Philippine Islands
The Little Entente
Austro-German Customs Union
Hongkong

Shanghai
French Indo-China
Free City of Danzig
Saar Territory
India
Czechoslovakia
Memel Territory
Tripoli
Haiti
Zollverein

IV

Recognition

A. Recognition as a Policy

§ 21. RECOGNITION: DEFINITIONS

NOTE BY THE EDITOR

The Institute of International Law (a nongovernmental organization of distinguished international lawyers) adopted resolutions at Brussels in April, 1936, containing the following definitions of recognition:

ARTICLE I. The recognition of a new State is the free act by which one or more States acknowledge the existence on a definite territory of a human society politically organized, independent of any other existing State, and capable of observing the obligations of international law, and by which they manifest their intention to consider it a member of the international community. Recognition has a declaratory effect. The existence of a new State with all the juridical effects which are attached to that existence, is not affected by the refusal of recognition by one or more States. . . . ARTICLE 10. The recognition of the new government of a State which has already been recognized is the free act by which one or several States acknowledge that a person or a group of persons are capable of binding the State which they claim to represent, and witness their intent to enter into relations with them.¹

Political entities may likewise be recognized as belligerents (see § 32 below) or insurgents (see § 33 below), without being recognized either as new States or new Governments of existing States.

Why is recognition important?—Recognition is ordinarily of great value, both to new States and to new governments in existing States. Until recognized, the new entity cannot carry on normal diplomatic intercourse

¹ 30 *A.J.I.L.* (*Supp.*, 1936), 185.

with a nonrecognizing State, or conclude treaties safeguarding vital political or commercial interests, or sue in the courts of a nonrecognizing State. Nationals of the unrecognized community find travel onerous or impossible because of passport difficulties and the cessation or attenuated state of the protection ordinarily afforded by their consuls. Passport difficulties and any weakening of consular protection may likewise tend to discourage or prevent visits of tourists or businessmen from nonrecognizing States and thus injure the economy of the unrecognized community. In addition, prestige value attaches to the unquestioned legal membership in the international community which is attested by the recognizing State in its act of recognition. It is combinations of such factors which make recognition of new governments in Mexico and Central America by the United States of such importance to those governments; in some cases, failure of the United States to recognize endangers their survival. It is such factors also which make the recognition of Manchukuo of enough importance to that State and to Japan so that participation in a concerted attitude of nonrecognition on the part of important governments is a foreign policy having real weight. (See §§ 26, 27 below.)

Acts constituting recognition.—Recognition is extended new States or governments by the organs of existing States competent to represent them in foreign relations. Certain acts by existing governments towards new States or governments automatically constitute *de jure* recognition: (1) the conclusion of a treaty with the new entity; (2) the sending or reception of accredited diplomatic agents; (3) the declaration or proclamation of recognition. Other acts are more equivocal and controversial: the conclusion of agreements more informal than treaties; the maintenance, sending, or reception of consular agents; salute to the flag; the maintenance of informal relations with *de facto* authorities; adherence of the new State or government to multilateral treaties; formal communications between heads of existing States and those of unrecognized States or governments. All of these can be contended to confer *de jure* recognition, but the practice of States does not support such claims. The growing tendency of governments to have dealings of a limited sort with *de facto* authorities, without wishing to extend to them the benefits of full recognition, has led to divergent doctrines as to whether there can exist mere *de facto* as opposed to *de jure* recognition, and as to whether the intent of the recognizing government determines what is recognized independently of the character of its acts.

Recognition is an act decided upon for itself by each existing State, and recognition of a new State or government by any existing State or group of States has no binding force as to any existing State which does not choose to recognize the newcomer. Nevertheless, several States may join together

by treaty in recognizing a new State as was the case with the recognition of Poland and Czechoslovakia in the Treaty of Versailles. Membership in the League of Nations does not imply *de jure* recognition by each Member of every other Member. In the case of new Members not named in the Annex to the Covenant, and admitted by a two-thirds vote, it could hardly be contended that a State voting against admission of the new Member had recognized that Member, especially if the State declined to exchange diplomatic representatives or enter into treaties with the new Member. This is the sort of anomalous situation best described by the term *de facto* recognition: the nonrecognizing State has assumed towards the new Member at least the obligations of League Membership, though perhaps no others. It may be doubted whether "admission to membership in the League has already made the practice of individual recognition of little consequence."² On the whole, it seems more accurate to regard Membership in the League of Nations as one form of credential to international status, and recognition by the individual State as another.

De facto and de jure recognition.—The Brussels Resolutions admit the possibility of *de facto* recognition in the case of both new States and new governments, while retaining in its treatment of *de jure* recognition the classical theory of "once recognized, recognized *de jure* and always recognized." As applied to States, their provisions are: "ARTICLE 3. Recognition is either definite and complete (*de jure*), or provisional or limited to certain juridical relations (*de facto*). . . . ARTICLE 9. Recognition *de facto* results either from an express declaration or from an act implying this intention, such as an agreement or *modus vivendi* having a limited purpose or a provisional character." Article 8, in the words italicized by the editor, suggests the difficulty of assigning definite consequences to any particular "*de facto*" recognition aside from the facts of the particular case: "The recognition of a State implies, *eventually, within the limits fixed by the act*, the recognition of the competence of the administrative, judicial, or other authorities of the new State, according to the rules of international law." As applied to new governments, the same uncertainty appears: "ARTICLE 14. Recognition of a new Government *de facto* is manifested: (1) either by an express declaration; (2) by the signing of agreements having a limited purpose or a provisional character; (3) or by the maintenance of relations with the new government for the purposes of current affairs. ARTICLE 15. Recognition *de facto* of a government does not necessarily imply the recognition of the competence of its judicial, administrative or other organs, or the attribution of territorial effects to their acts," while recognition *de jure* does imply acceptance of such competence (Article 17). Article 15 arouses controversy,

² Fenwick, *International Law*, 2d Ed. (1934), 107-108. See generally, M. W. Graham, *The League of Nations and the Recognition of States* (1933).

but the objectors appear to be those who really contend that there is only one kind of recognition. Once it is agreed that both *de facto* and *de jure* recognition are possible, their consequences must be different in some such way as is indicated in Articles 15 and 17.

Is recognition revocable?—Once granted, is recognition revocable by the recognizing State? By those who consider recognition as an act in which the recognizing State merely registers its acceptance of the existence of the new State or government as one with which it is willing to conduct international intercourse in the normal way, recognition is considered irrevocable: a fact once recognized cannot be “unrecognized.” Diplomatic relations can be broken off by the withdrawal of diplomatic representatives (see § 124), but this does not mean the withdrawal of the former acceptance of the recognized community as one capable of international intercourse. This is the generally accepted view. On the other hand, if one regards recognition as being entirely determined by the intent of the recognizing State, it is possible to contend that it may be withdrawn. There appear to be no clear cases where recognition once granted has been withdrawn in practice. It is difficult to imagine a case in which a so-called withdrawal at least of *de jure* recognition would be any different from the breaking off of diplomatic relations. The Brussels Resolutions support in the main the accepted view: “ARTICLE 5. Recognition *de jure* is irrevocable; it ceases to have effect only in case of the definite disappearance of one of the essential elements whose conjunction was established at the moment of recognition.” (The essential elements are those defined in Article 1.) “ARTICLE 6. In the case of an obligation assumed by a State at the time of its recognition, failure to fulfill this obligation does not have the effect of annulling recognition or of authorizing its revocation, but involves the consequences of the violation of an international obligation.”³

The Resolutions, while admitting the possibility of *de facto* recognition of both new States and new governments, do not discuss the revocability of *de facto* recognition. Since *de facto* recognition (if it exists at all) is so largely determined by intent, and is limited to specified jural relations, it would seem that termination of such relations might be considered as withdrawal of such recognition.

§ 22. RECOGNITION POLICY OF THE UNITED STATES

The recognition of a new State, or of a new government in an already recognized State, is a matter for the political authorities in charge of the foreign affairs of the recognizing State to weigh and decide. In the United States the President

³ 30 A.J.I.L. (Supp., 1936), 186.

takes the responsibility in determining these matters, because under the Constitution he is empowered to send and to receive ambassadors from other States, and to make treaties by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur. The reception of diplomatic representatives from a new State or a new government and the signature of treaties are considered the principal methods of according "recognition" to such new States or governments.

The Secretary of State is the officer of the United States government entrusted by the President with the administration of our foreign affairs. His public utterances may be taken as reflecting the policies of the President. Below is printed part of an address of Mr. H. L. Stimson, Secretary of State under President Hoover, explaining the recognition policy of the United States government at a time when certain of its Central and South American manifestations were under fire. It should be noted: (1) that the speech deals entirely with the policy of the United States in Central and South America, and does not mention Russia, though when the speech was made a government had been in *de facto* control of affairs in Russia over thirteen years without receiving the recognition of the United States; (2) that the speech deals only with recognition *policy*, not with the position of recognized and unrecognized governments before the courts. For the attitude of the courts, see §§ 28-31 below.

The United States and the Other American Republics: A Discussion of Recent Events

ADDRESS BY SECRETARY OF STATE STIMSON, 1931

From an address before the Council on Foreign Relations, New York City, February 6, 1931. *Publication No. 156, Department of State. Latin-American Series, No. 4.*

RECOGNITION

The recognition of a new state has been described as the assurance given to it that it will be permitted to hold its place and rank in the character of an independent political organism in the society of nations. The recognition of a new government within a state arises in practice only when a government has been changed or established by revolution or by a *coup d'état*. No question of recognition normally arises, for example, when a king dies and his heir succeeds to the throne, or where as the result of an election in a republic a new chief executive constitutionally assumes office. The practice of this country as to the recognition of new governments has been substantially uniform from the days of the administration of Secretary of State Jefferson in 1792 to the days of Secretary of State Bryan in 1913. There were certain slight departures from this policy during the Civil War, but they were manifestly due to the exigencies of warfare and were abandoned immediately afterwards. This general policy, as thus observed, was to base the act of recognition not upon the question of the constitutional legitimacy of the new government but upon its *de facto* capacity to fulfill its obligations

as a member of the family of nations. This country recognized the right of other nations to regulate their own internal affairs of government and disclaimed any attempt to base its recognition upon the correctness of their constitutional action.

Said Mr. Jefferson in 1792:

We certainly cannot deny to other nations that principle whereon our own Government is founded, that every nation has a right to govern itself internally under what forms it pleases, and to change these forms at its own will; and externally to transact business with other nations through whatever organ it chooses, whether that be a king, convention, assembly, committee, president, or whatever it be. (*Jefferson to Pinckney, Works, Vol. III, p. 500.*)

In these essentials our practice corresponded with the practice of the other nations of the world.

The particular considerations upon which our action was regularly based were well stated by Mr. Adee, long the trusted Assistant Secretary of State of this Government, as follows:

Ever since the American Revolution entrance upon diplomatic intercourse with foreign states has been *de facto*, dependent upon the existence of three conditions of fact: the control of the administrative machinery of the state; the general acquiescence of its people; and the ability and willingness of their government to discharge international and conventional obligations. The form of government has not been a conditional factor in such recognition; in other words, the *de jure* element of legitimacy of title has been left aside. (*Foreign Relations of the United States, 1913, p. 100.*)

With the advent of President Wilson's administration this policy of over a century was radically departed from in respect to the Republic of Mexico, and, by a public declaration on March 11, 1913, it was announced that—

Cooperation (with our sister republics of Central and South America) is possible only when supported at every turn by the orderly processes of just government based upon law, not upon arbitrary or irregular force. We hold, as I am sure that all thoughtful leaders of republican government everywhere hold, that just government rests always upon the consent of the governed, and that there can be no freedom without order based upon law and upon the public conscience and approval. We shall look to make these principles the basis of mutual intercourse, respect, and helpfulness between our sister republics and ourselves. (*Foreign Relations of the United States, 1913, p. 7.*)

Mr. Wilson's government sought to put this new policy into effect in respect to the recognition of the then Government of Mexico held by President Victoriano Huerta. Although Huerta's government was in *de facto* possession, Mr. Wilson refused to recognize it, and he sought through the influence

and pressure of his great office to force it from power. Armed conflict followed with the forces of Mexico, and disturbed relations between us and that republic lasted until a comparatively few years ago.

In his sympathy for the development of free constitutional institutions among the people of our Latin American neighbors, Mr. Wilson did not differ from the feelings of the great mass of his countrymen in the United States, including Mr. Jefferson and Mr. Adams, whose statements I have quoted; but he differed from the practice of his predecessors in seeking actively to propagate these institutions in a foreign country by the direct influence of this Government and to do this against the desire of the authorities and people of Mexico.

The present administration has refused to follow the policy of Mr. Wilson and has followed consistently the former practice of this Government since the days of Jefferson. As soon as it was reported to us, through our diplomatic representatives, that the new governments in Bolivia, Peru, Argentina, Brazil, and Panama were in control of the administrative machinery of the state, with the apparent general acquiescence of their people, and that they were willing and apparently able to discharge their international and conventional obligations, they were recognized by our Government. And, in view of the economic depression, with the consequent need for prompt measures of financial stabilization, we did this with as little delay as possible in order to give those sorely pressed countries the quickest possible opportunities for recovering their economic poise.

Such has been our policy in all cases where international practice was not affected or controlled by preexisting treaty. In the five republics of Central America, Guatemala, Honduras, Salvador, Nicaragua, and Costa Rica, however, we have found an entirely different situation existing from that normally presented under international law and practice. As I have already pointed out, those countries geographically have for a century been the focus of the greatest difficulties and the most frequent disturbances in their earnest course towards competent maturity in the discharge of their international obligations. Until some two decades ago, war within and without was their almost yearly portion. No administration of their government was long safe from revolutionary attack instigated either by factions of its own citizens or by the machinations of another one of the five republics. Free elections, the cornerstone upon which our own democracy rests, had been practically unknown during the entire period. In 1907 a period of strife, involving four of the five republics, had lasted almost without interruption for several years. In that year, on the joint suggestion and mediation of the Governments of the United States and Mexico, the five republics met for the purpose of considering methods intended to mitigate and, if possible,

terminate the intolerable situation. By one of the conventions which they then adopted, the five republics agreed with one another as follows:

The Governments of the high contracting parties shall not recognize any other government which may come into power in any of the five republics as a consequence of a *coup d'état*, or of a revolution against the recognized government, so long as the freely elected representatives of the people thereof have not constitutionally reorganized the country.

Sixteen years later, in 1923, the same five republics evidently satisfied with the principle they had thus adopted and desiring to reinforce it and prevent any future evasions of that principle, met again, reenacted the same covenant, and further promised each other that even after a revolutionary government had been constitutionally reorganized by the representatives of the people, they would not recognize it if its president should have been a leader in the preceding revolution or related to such a leader by blood or marriage, or if he should have been a cabinet officer or held some high military command during the accomplishment of the revolution. Some four months thereafter, our own Government, on the invitation of these republics, who had conducted their meeting in Washington, announced through Secretary Hughes, that the United States would in its future dealings with those republics follow out the same principle which they had thus established in their treaty. Since that time we have consistently adhered to this policy in respect to those five republics.

We followed that policy in Guatemala in the case of a recent revolution in which some fifty-seven people were killed. General Orellano, the leader of the revolt, set himself up as the provisional president of that republic on December 16, 1930. On December 22, 1930, we notified him that in accordance with the policy established by the 1923 treaty he would not be recognized by us. No recognition was granted him by any of the other four republics. Following this, he tendered his resignation and retired from office; and on January 2, 1931, through the constitutional forms provided in the Guatemalan Constitution, Señor Reina Andrade was chosen provisional president by the Guatemalan Congress and immediately called a new election for a permanent president. Thereupon this country and the other four republics recognized the government of Señor Reina Andrade.

Since the adoption by Secretary Hughes, in 1923, of the policy of recognition agreed upon by the five republics in their convention, not one single revolutionary government has been able to maintain itself in those five republics. Twice, once in Nicaragua and once in the case of Guatemala, just described, a revolutionary leader has succeeded in grasping the reins of government for a brief period. But in each case the failure to obtain recognition has resulted in his prompt resignation, on account of his inability to

borrow money in the international markets. Several times within the same period a contemplated revolution has been abandoned by its conspirators on the simple reminder by a minister from this country or one of the other republics that, even if they were successful, their government would not be recognized; and undoubtedly in many more cases has the knowledge of the existence of the policy prevented even the preparation for a revolution or *coup d'état*. In every one of these cases the other four republics have made common cause in the efforts of the United States to carry out their policy and maintain stability. When one compares this record with the blood-stained history of Central America before the adoption of the treaty of 1923, I think that no impartial student can avoid the conclusion that the treaty and the policy which it has established in that locality has been productive of very great good.

Of course it is a departure from the regular international practice of our Government, and it undoubtedly contains possible difficulties and dangers of application which we in the State Department are the last to minimize and in case of which, should they arise, this Government must reserve its freedom of action. But the distinction between this departure, which was suggested by the five republics themselves and in which we have acted at their earnest desire and in cooperation with them, and the departure taken by President Wilson in an attempt to force upon Mexico a policy which she resented must be apparent to the most thoughtless student. A few weeks ago Judge John Bassett Moore, who as Counselor of the State Department was a member of Mr. Wilson's administration, criticized Mr. Wilson's departure from the former practice of this country, and he included within his criticism the departure initiated by the treaty of 1923. He did not, however, point out the foregoing radical difference of principle between the two policies, nor the entirely different results which have followed each, and which thus far seem quite to justify the policy of 1923.

Furthermore, it may be noted that one of the dangers which might be apprehended from this policy of recognition adopted by the five Central American republics under the treaty of 1923 has not materialized. One of the most serious evils in Central America has been the fact that throughout the history of those republics, until recently, it has been the habitual practice of the president who held the machinery of government to influence and control the election of his successor. This has tended to stimulate revolution as the only means by which a change of government could be accomplished. The danger was therefore manifest that this treaty of 1923 might result in perpetuating the autocratic power of the governments which were for the time in possession. As a matter of fact this has not happened. On the contrary, significant improvement has taken place in election practice. The Government of Nicaragua of its own motion has sought and obtained the

assistance of the United States in securing free and uncontrolled elections in 1928 and 1930. The Government of Honduras, in 1928, without any such assistance, conducted an election which was so free that the party in power was dispossessed by the opposition party; and a similar free election has apparently occurred in 1930. For nearly one hundred years before 1923 free elections have been so rare in Central America as to be almost unique. Of course, it is too early to make safe generalizations, but it would seem that the stability created by the treaty of 1923 apparently has not tended to perpetuate existing autocracies but, on the contrary, to stimulate a greater sense of responsibility in elections. . . .

§ 23. RECOGNITION AS A POLITICAL ACT

NOTE BY THE EDITOR

A new State or a new government in an existing State has no right in law to be recognized. Such recognition—or recognition of belligerency or of insurgency—is a *political* matter, one for the executive authorities in charge of the foreign affairs of the recognizing State to weigh and decide. The best international practice affords legal standards like those Secretary Stimson quoted from Mr. Adee: “Ever since the American Revolution entrance upon diplomatic intercourse with foreign states has been *de facto*, dependent upon the existence of three conditions of fact: the control of the administrative machinery of the state; the general acquiescence of its people; and the ability and willingness of their government to discharge international and conventional obligations. The form of government has not been a conditional factor in such recognition . . .” Nevertheless, in granting recognition, the executive is often influenced as much by more general political consideration as by these standards. Recognition is a positive benefit to the community recognized; why should not this benefit be withheld or otherwise used by the recognizing State to drive a good bargain on other outstanding questions? It is often possible to do just this by the interpretation of the third of Mr. Adee’s standards—the willingness and ability of the government seeking recognition to discharge international and conventional obligations most favorable to the recognizing State. This was the reason given by the United States for denying recognition to Soviet Russia for sixteen years, a recognition finally accomplished unequivocally only as a part of a complicated bargain covering many outstanding questions, and the question of Russian debts (“international and conventional obligations”) only very transparently indeed (§ 24). Thus Great Britain’s agreement to use her influence to secure general recognition of Italy’s Ethiopian Empire (April, 1938) was apparently only an indissoluble part of a general settlement of all principal questions outstanding between the two States. The

flexibility of Mr. Adee's third standard, and its ready adaptability for use in support of national policy, is further illustrated by the nonrecognition policy pursued by the United States and League Members towards Manchukuo (§§ 26, 27 below).

It is probably too much for international lawyers to expect that statesmen in charge of foreign relations will abandon the power to recognize for less than what it is worth in a negotiation in favor of a general policy of recognizing new States and governments on the basis of the first two of Mr. Adee's standards only. That the power to recognize will probably continue to be used as a political weapon, is suggested by the refusal of the United States to recognize as legal the assumption by Germany in 1939 of a protectorate over Bohemia and Moravia. (See § 18b.)

§ 24. AMERICAN RECOGNITION OF THE SOVIET UNION

Following the exchange of communications printed below, the Soviet Union and the United States exchanged ambassadors. The United States had not previously sent a diplomatic representative to, or received one from, the Russian government which established *de facto* control in Russia in November, 1917.

Exchanges of Communications Between the President of the United States and (a) The President of the All-Union Central Executive Committee, U.S.S.R. (b) The People's Commissar for Foreign Affairs, U.S.S.R.

White House Press Releases, as reprinted in 28 American Journal of International Law (Supp., January, 1934), 1-3.

President Roosevelt to Mr. Kalinin

THE WHITE HOUSE
Washington, October 10, 1933

My dear Mr. PRESIDENT:

Since the beginning of my administration, I have contemplated the desirability of an effort to end the present abnormal relations between the hundred and twenty-five million people of the United States and the hundred and sixty million people of Russia.

It is most regrettable that these great peoples, between whom a happy tradition of friendship existed for more than a century to their mutual advantage, should now be without a practical method of communicating directly with each other.

The difficulties that have created this anomalous situation are serious but not, in my opinion, insoluble; and difficulties between great nations can be removed only by frank, friendly conversations. If you are of similar mind, I should be glad to receive any representatives you may designate to explore with me personally all questions outstanding between our countries.

Participation in such a discussion would, of course, not commit either nation to any future course of action, but would indicate a sincere desire to reach a satisfactory solution of the problems involved. It is my hope that such conversations might result in good to the people of both our countries.

I am, my dear Mr. President,

Very sincerely yours,

FRANKLIN D. ROOSEVELT

MR. MIKHAIL KALININ

President of the All-Union Central Executive Committee
Moscow

Mr. Kalinin to President Roosevelt

Moscow, October 17, 1933

My dear Mr. PRESIDENT:

I have received your message of October tenth.

I have always considered most abnormal and regrettable a situation wherein, during the past sixteen years, two great republics—The United States of America and the Union of Soviet Socialist Republics—have lacked the usual methods of communication and have been deprived of the benefits which such communication could give. I am glad to note that you also reached the same conclusion.

There is no doubt that difficulties, present or arising, between two countries, can be solved only when direct relations exist between them; and that, on the other hand, they have no chance for solution in the absence of such relations. I shall take the liberty further to express the opinion that the abnormal situation, to which you correctly refer in your message, has an unfavorable effect not only on the interests of the two states concerned, but also on the general international situation, increasing the element of disquiet, complicating the process of consolidating world peace and encouraging forces tending to disturb that peace.

In accordance with the above, I gladly accept your proposal to send to the United States a representative of the Soviet Government to discuss with you the questions of interest to our countries. The Soviet Government will be represented by Mr. M. M. Litvinov, People's Commissar for Foreign Affairs, who will come to Washington at a time to be mutually agreed upon.

I am, my dear Mr. President,

Very sincerely yours,

MIKHAIL KALININ

MR. FRANKLIN D. ROOSEVELT

President of the United States of America
Washington

President Roosevelt to Mr. Litvinoff

THE WHITE HOUSE

Washington, November 16, 1933

My dear Mr. LITVINOV:

I am very happy to inform you that as a result of our conversations the Government of the United States has decided to establish normal diplomatic

relations with the Government of the Union of Soviet Socialist Republics and to exchange ambassadors.

I trust that the relations now established between our peoples may forever remain normal and friendly, and that our nations henceforth may coöperate for their mutual benefit and for the preservation of the peace of the world.

I am, my dear Mr. Litvinov,

Very sincerely yours,

FRANKLIN D. ROOSEVELT

MR. MAXIM M. LITVINOV

*People's Commissar for Foreign Affairs
Union of Soviet Socialist Republics*

Mr. Litvinoff to President Roosevelt

Washington, November 16, 1933

My dear Mr. PRESIDENT:

I am very happy to inform you that the Government of the Union of Soviet Socialist Republics is glad to establish normal diplomatic relations with the Government of the United States and to exchange ambassadors.

I, too, share the hope that the relations now established between our peoples may forever remain normal and friendly, and that our nations henceforth may coöperate for their mutual benefit and for the preservation of the peace of the world.

I am, my dear Mr. President,

Very sincerely yours,

MAXIM LITVINOFF

*People's Commissar for Foreign Affairs,
Union of Soviet Socialist Republics*

MR. FRANKLIN D. ROOSEVELT

*President of the United States of America
The White House*

The following communications of the same date (November 16, 1933) are omitted:

1 and 2. Notes of Mr. Litvinoff to President Roosevelt, and President Roosevelt to Mr. Litvinoff, relating to the policies of the United States and the U. S. S. R. as to the activities of organizations in each directed at the political and social order of the other.

3 and 4. Notes between the same persons relating to freedom of religious worship.

5 and 6. Notes between the same persons relating to most favored nation treatment in a projected Consular Convention between the two States.

7. Memorandum relating to Mr. Litvinoff's answer to President Roosevelt's question relating to prosecutions for economic espionage.

8 and 9. Notes between the persons indicated above, relating to claims and counterclaims of the two governments and their nationals.

10. Note from Mr. Litvinoff to President Roosevelt relating to claims arising out of the activities of American military forces in Siberia.

11. Joint statement of the same persons expressing hope for settlement of questions still outstanding between the two governments.¹

§ 25. AMERICAN RECOGNITION OF THE SOVIET UNION

NOTE BY THE EDITOR

Mr. John Bassett Moore, formerly a Judge of the Permanent Court of International Justice, contended that, before this exchange of communications, the United States Government had recognized the Soviet Government.

That the Government of the United States had in fact recognized the Soviet Government there can be no doubt. In saying this I do not especially rely upon the circumstance that both governments are with mutual knowledge, desire and satisfaction parties to certain multilateral treaties, including our own Kellogg Pact; but I do have in mind, among other things, the fact that the United States nearly four years ago, pending a controversy between Russia and China, called the attention of the Soviet Government to its obligations under it. We did this not indeed directly, but through the French Government. But the acts of recognition to which I have heretofore adverted have lately been superseded by a direct recognition of the highest validity. On May 16, 1933, the President of the United States addressed an official message individually and directly to the heads of the world's governments, including that of Russia. The message this time was addressed to the Soviet Government, not indirectly through another government, but directly to "President Mikhail Kalinin, All-Union Central Executive Committee, Moscow, Russia."^{1a}

President Roosevelt is reported to have held the opinion that recognition did not take place until he intended it, at the termination of his conversations with Litvinoff "at ten minutes before midnight, November 16, 1933."²

QUERY: On what date did *de jure* recognition of the Soviet Government take place? Was there *de facto* recognition? On what date?

§ 26. THE POLICY OF NONRECOGNITION

The military activities of Japan in Manchuria beginning in September, 1931, led to the publication, on February 18, 1932, of a "Declaration of Independence"

¹ These documents and others of interest in this connection, may be found in *Press Releases*, Department of State, November 17, 1933, November 18, 1933 and in 28 *A.J.I.L.* (1934), 12-21.

^{1a} "The New Isolation," 27 *A.J.I.L.* (1933), 618, 620.

² Briggs, *Law of Nations* (1938), p. 69.

of the Manchurian provinces. The Declaration was issued by a Supreme Administrative Council, established February 17, 1932, and consisting of Chinese sympathetic with the Japanese. The way for the issuance of the Declaration had been prepared by the establishment of provincial authorities sympathetic to the Japanese, and the activities of the Self-Government Guiding Board, stated in the *Report of the Commission of Enquiry of the League of Nations*—the "Lytton Report"—(on the authority of reliable witnesses) "to have been organized, and in large part officered by Japanese, though its chief was a Chinese, and to have functioned as an organ of the Fourth Department of the Kwantung Army Headquarters." The Self-Government Guiding Board promoted a "great popular movement" for independence, which gave the Declaration of Independence the semblance of popular support. (See *Lytton Report*, Chap. VI, especially pp. 92-93.) After the Declaration, the Self-Government Guiding Board, through local committees, took a leading part in encouraging popular manifestations of support for independence, and in convening an All-Manchuria Convention at Mukden on February 29. At this convention a resolution was unanimously approved welcoming the new State, and another designating Henry Pu-Yi as the Regent of "Manchukuo." On March 9, the local administrations were generally merged as an independent State under the name of "Manchukuo," and Mr. Pu-Yi was inaugurated as Regent. (See generally *Lytton Report*, Chap. VI.)

On September 15, 1932, Japan entered into a Protocol with "Manchukuo," beginning "Whereas Japan has recognized the fact that Manchukuo in accordance with the free will of its inhabitants has organized and established itself as an independent State . . .," confirming Japanese rights under existing Sino-Japanese treaties, and establishing a defensive alliance. This constituted *de jure* recognition of Manchukuo as an independent State as far as Japan was concerned; while the Manchukuoan administration was dominated by Japanese officials. In the meantime, the United States and the Members of the League of Nations had come to substantial agreement on a policy under which none of them individually would recognize the new State. The materials printed below are significant for the development of this policy, as are the recommendations printed in § 27. To date (1939) only Japan, El Salvador, Germany, Italy and Hungary have recognized Manchukuo *de jure*.

Materials Relating to Nonrecognition of the State of Affairs in Manchuria

The materials are printed as arranged in Quincy Wright, "The Stimson Note of January 7, 1932," in 26 *American Journal of International Law* (1932), 342-344.

IDENTIC NOTE BY THE UNITED STATES TO CHINA AND JAPAN, JANUARY 7, 1932

"In view of the present situation and of its own rights and obligations therein, the American Government deems it to be its duty to notify both the Government of the Chinese Republic and the Imperial Japanese Government that it cannot admit the legality of any situation *de facto* nor does it intend to recognize any treaty or agreement entered into between these governments, or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the

sovereignty, the independence or the territorial and administrative integrity of the Republic of China, or to the international policy relative to China, commonly known as the Open Door Policy; and that it does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which treaty both China and Japan, as well as the United States, are parties."

NOTE OF CHINA TO THE UNITED STATES, JANUARY 12, 1932

"With reference to the notification of Your Excellency's Government that in this matter it does not recognize as legal any situation *de facto*, I have the honor to state that the Chinese Government has repeatedly lodged with the Japanese Government gravest protests against the various invasions and lawless acts perpetrated by the Japanese troops since September 18, 1931, and have made it known internationally that the Chinese Government accord them no recognition whatsoever. With regard to the treaties or agreements referred to in the note under reply, I have the honor to state that the Chinese Government, basing its position on its sovereignty and independence and on the principle of territorial and administrative integrity, has absolutely no intention of concluding any treaties or agreements of the category described. It is the sincere hope of the Chinese Government that Your Excellency's Government will continue to promote the effectiveness of the international covenants in order that their dignity may be conserved."

NOTE OF JAPAN TO THE UNITED STATES, JANUARY 16, 1932

"The Government of Japan takes note of the statement by the Government of the United States that the latter cannot admit the legality of matters which might impair the treaty rights of the United States or its citizens or which might be brought about by means contrary to the treaty of August 27, 1928. It might be the subject, of an academic doubt, whether in a given case the impropriety of means necessarily and always avoids the ends secured, but as Japan has no intention of adopting improper means, that question does not practically arise."

NOTE BY MEMBERS OF THE COUNCIL OF THE LEAGUE OF NATIONS OTHER THAN CHINA AND JAPAN TO JAPAN, JANUARY 16, 1932

"The twelve members of the Council recall the terms of Article X of the Covenant, by which all members of the League have undertaken to respect and preserve the territorial integrity and existing political independence of other members. It is their friendly right to direct attention to this provision, particularly as it appears to them to follow that no infringe-

ment of the territorial integrity and no change in the political independence of any member of the League brought about in disregard of this article ought to be recognized as valid and effectual by the members of the League of Nations."

NOTE OF JAPAN TO PRESIDENT OF THE COUNCIL OF THE LEAGUE OF
NATIONS, FEBRUARY 21, 1932

"As Japan does not contemplate any attack on the territorial integrity or the independence of a member of the League of Nations, it is superfluous to say that the bearing of the observation that attacks of such a character made in defiance of Article X of the Covenant cannot be recognized as valid and effective is totally obscure to the Japanese Government."

LETTER OF SECRETARY OF STATE STIMSON TO SENATOR BORAH,
FEBRUARY 24, 1932

"On January 7, last, upon the instruction of the President, this Government formally notified Japan and China that it would not recognize any situation, treaty or agreement entered into by those governments in violation of the covenants of these treaties, which affected the rights of our government or its citizens in China. If a similar decision should be reached and a similar position taken by the other governments of the world, a caveat will be placed upon such action which, we believe, will effectively bar the legality hereafter of any title or right sought to be obtained by pressure or treaty violation, and which, as has been shown by history in the past, will eventually lead to the restoration to China of rights and titles of which she may have been deprived."

RESOLUTION OF THE ASSEMBLY OF THE LEAGUE OF NATIONS, MARCH 11, 1932

"The Assembly . . . declares that it is incumbent upon the members of the League of Nations not to recognize any situation, treaty, or agreement which may be brought about by means contrary to the Covenant of the League of Nations or the Pact of Paris."

STATEMENT OF SECRETARY OF STATE STIMSON IN REFERENCE TO
ASSEMBLY RESOLUTION, MARCH 11, 1932

"This action will go far toward developing into terms of international law the principles of order and justice which underlie those treaties, and the Government of the United States has been glad to coöperate earnestly in this effort."

§ 27. SOME CONSEQUENCES OF NONRECOGNITION

Materials in § 26 indicate sufficiently the refusal of the United States and League Members to recognize Manchukuo. Just what were the consequences of this refusal, and what penalties may a new State suffer from a denial of recognition by a single State or by a number of States acting collectively? The document printed below gives some clue to the answers to these questions. It contains the recommendations of an Advisory Committee of the League of Nations as to measures to be taken in connection with the nonrecognition of Manchukuo, and was transmitted to League Members and to "those nonmember States to which the Assembly's report regarding the Sino-Japanese dispute has been communicated." The Advisory Committee expressed its conviction that each such government would "as far as it is concerned, take the measures recommended." It is thus clear that what is recommended is individual action by each Member concerned, along the lines of the recommendations. To the extent that such action is taken, there is an impressive demonstration of the consequences of nonrecognition.

Recommendations of the Advisory Committee of the Assembly of the League of Nations, Addressed to All Governments on June 7, 1933

League of Nations Official Journal, 1933, Special Supplement 113, Annex, pp. 11-16.

By its resolution of February 24th, 1933, the Assembly appointed an Advisory Committee to follow the situation in the Far East, to assist the Assembly in performing its duties under Article 3, paragraph 3, of the Covenant, and, with the same objects, to aid the Members of the League in concerting their action and their attitude among themselves and with the non-member States.

The Advisory Committee noted that, according to Part IV, Section III, of the report adopted by the Assembly on February 24th, "the Members of the League intend to abstain, particularly as regards the existing regime in Manchuria, from any act which might delay the carrying-out of the recommendations of the said report. They will continue not to recognise this regime either *de jure* or *de facto*. They intend to abstain from taking any isolated action with regard to the situation in Manchuria and to continue to concert their action among themselves as well as with the interested States not Members of the League."

The Advisory Committee has thought it expedient to enquire into the question of the consequences that might be involved for Governments by the non-recognition of the existing regime in Manchuria. It calls the attention of Members of the League to the desirability of the measures described below being taken by each of them so far as it is concerned. It desires to add that, in its capacity of an advisory body, it remains at the disposal of Members of the League for the examination of any question, within the scope of its

terms of reference, which they may request it to study with a view to giving them its opinion and proposing concerted action to the Governments.

The problems that the Advisory Committee has so far investigated are the following: question of the participation of the present Government of Manchuria in international Conventions; postal services and stamps; question of the international non-recognition of the currency of "Manchukuo"; problems that may be raised by the acceptance by foreigners of concessions or appointments in Manchuria; question of passports; position of consuls; application of the import and export certificate system under the Geneva Opium Convention (1925) and the Limitation Convention (1931).

I. It is clear that, in deciding to continue not to recognise either *de jure* or *de facto* the existing regime in Manchuria, the Members of the League of Nations had in view that, should "Manchukuo" manifest its intention of acceding to certain general international Conventions, they would take all steps in their power to prevent such accession. Some of these conventions have created international unions or bureaux, participation in which is only possible by way of accession to the Convention by which they were created.

The Committee has examined the various general international Conventions in order to ascertain by what procedure the Members of the League could take steps, in conformity with the Assembly's recommendation, in the event of "Manchukuo" signifying a desire to accede to such Conventions. From this point of view, these Conventions may be classified as follows:

(a) Closed Conventions, under which the parties have to be consulted as to the admission of new members. In such cases, the Members of the League will act in conformity with the Assembly's recommendation by refusing to agree to the admission of "Manchukuo."

(b) Open Conventions. These Conventions provide that States shall be allowed to accede by unilateral act. In view of the special case of "Manchukuo" and the attitude adopted by the Members of the League towards that regime, the Advisory Committee has decided to propose that the States with which acts of accession are deposited should previously consult the contracting parties to the Convention in question, should the "Manchukuo Government" express a desire to accede thereto. Should they be so consulted in regard to one or more of these Conventions by the State with which an act of accession is deposited, those of the Members of the League who are contracting parties to the Convention would have an opportunity to give, in conformity with the Assembly's recommendation, a negative opinion as to the acceptance of the accession of "Manchukuo," and the result of the consultation would enable the States with which the acts of accession are deposited to rely, in their reply to the applicant, upon the opinion of the other contracting States.

In respect more particularly of the Conventions mentioned hereinafter,

the Governments that might have occasion thus to consult the other contracting States are those of Belgium, Spain, France, Italy, the Netherlands and Switzerland.

BELGIUM:

Convention of December 31st, 1913, for the Constitution of an International Bureau of Commercial Statistics.

Convention of March 15th, 1886, for the International Exchange of Official Documents and of Scientific and Literary Publications.

Convention of July 5th, 1890, establishing an International Union for the Publication of Customs Tariffs.

SPAIN:

International Convention on Telecommunications, Madrid, December 9th, 1932, establishing the International Union for Telecommunications.

FRANCE:

Convention on the Regulation of Aerial Navigation, Paris, October 13th, 1919 (Article 41).

Convention concerning International Exhibitions, Paris, November 22nd, 1928.

Agreement for the Constitution of an International Office for dealing with Contagious Diseases of Animals, Paris, January 25th, 1924.

Convention for the Constitution of an International Office of Chemistry, October 29th, 1927.

Metric Convention, signed May 20th, 1875, revised 1921, respecting the Constitution of an International Office of Weights and Measures.

Sanitary Convention, opened for signature at Paris, on June 26th, 1926.

ITALY:

International Agreement respecting the Constitution of an International Office of Public Health, Rome, December 9th, 1907.

NETHERLANDS:

Convention signed at the second Hague Conference (1907).

International Opium Convention, signed at The Hague on January 23rd, 1912.

International Sanitary Convention for Air Navigation, 1933.

SWITZERLAND:

Convention regarding Industrial Property (establishing the International Office of the Union for the Protection of Industrial Property; first Convention concluded 1883, revised 1925).

Convention for the Constitution of an International Union for the Protection of Literary and Artistic Works (first Convention concluded September 9th, 1886, revised 1928).

Universal Postal Convention (latest revised text, London, June 28th, 1929).

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (Red Cross Convention), signed at Geneva on July 27th, 1929.

Convention relating to the Treatment of Prisoners of War.

In regard to the Treaty for the Renunciation of War (Pact of Paris), the Government of the United States of America might be looked upon as occupying a position similar to that of the Governments of those States Members of the League with which Conventions have been deposited.

(c) Conventions concluded under the auspices of the League of Nations. As the majority of the Conventions concluded under the auspices of the League are open for subsequent accession in accordance with decisions taken by the Council of the League alone, no action on the part of the States parties to those Conventions is called for.

As regards such of these Conventions as are open, the Secretary-General of the League could not receive any accession from "Manchukuo," and, in the case of the Conventions for the Supervision of the Trade in Arms and Ammunition and the Prohibition of the Use of Asphixiating Gases, the French Government has been requested to refer, if necessary, to the States parties to those Conventions.

Certain Conventions, such as the Hague Convention for the Pacific Settlement of International Disputes and the Protocol of Signature concerning the Statute of the Permanent Court of International Justice, contain accession clauses having the same effect as an automatic exclusion of "Manchukuo." As in the case of the Conventions open to accession in accordance with decisions taken by the Council of the League, no action on the part of the contracting parties to these Conventions is called for.

The Advisory Committee has also examined the statutes of certain international commissions and associations not set up under international Conventions. It considers that, inasmuch as these bodies are not set up under the provisions of an international Convention, there can be no question of drawing conclusions regarding the *de jure* recognition of a State from the admission to or participation in these commissions or associations of a delegate of any public authority whatever. Moreover, no conclusion regarding a *de facto* recognition can be drawn from the admission to or participation in these bodies of a delegate appointed by a public authority, if these bodies also include delegations of administrations or private associations. It is, however, desirable even in this latter case that the States Members of the League represented in these organisations should take all steps in their power to avoid the participation of representatives of "Manchukuo."

II. With regard to postal services, the Chinese Government intimated on July 24th, 1932, that in virtue of Article 27 of the Universal Postal Convention, it had requested the Universal Postal Union to notify all Member States as follows:

(1) That all postal service in Manchuria has been temporarily suspended;

(2) That all mails destined for Europe and America will henceforth be forwarded respectively via the Suez Canal and the Pacific Ocean; the Chinese Government requests that all post offices of the member States will do the same with their mails destined for China;

(3) That all stamps issued by the puppet government will be invalid. All mail matter or parcels bearing these illegal stamps will be charged postage due.

Apart from this communication from the Chinese Government, the Advisory Committee thinks it will suffice to remind the Members of the League that "Manchukuo" is not a member of the Universal Postal Union, and of the measures proposed above, should the question of its accession to the Universal Postal Convention arise.

III. After considering the currency question, the Advisory Committee has arrived at the conclusion that a domestic currency is created by a domestic law, and is actually utilised in the same way as any other object of value that is bought or sold in the international market. The Committee thinks it inexpedient to propose that Governments should pass legislation prohibiting transactions in "Manchukuo" currency, but it desires to call the attention of countries which have an official foreign exchange market to the desirability of taking any useful measures in order not to admit official quotations in "Manchukuo" currency.

IV. While recognising that the report adopted by the Assembly under Article 15, paragraph 4, of the Covenant does not prohibit nationals of States Members of the League from entering into contractual relations with anyone in Manchuria, nor from accepting concessions or appointments from the authorities established there, the Committee feels that it rests with each of the Members of the League to decide for itself whether it is desirable to call the attention of its nationals to the special risks attendant upon the acceptance of concessions or appointments in Manchuria. In this sense, a Government might urge the difficulty it might experience in protecting such nationals, in view of the position created by the Assembly's report, and also the probable attitude of the Chinese authorities with regard to the validity of such concessions or appointments obtained in the present circumstances from the authorities established in Manchuria.

V. In the Committee's opinion, a Government which did not recognise the existing regime in Manchuria either *de jure* or *de facto* could not regard

as a passport a document issued by authorities dependent on the "Manchukuo Government," and could not, therefore, allow any of its own agents to visa such a document. On the other hand, there is no reason why an inhabitant of the territory subject to the "Manchukuo" authorities who is desirous of proceeding abroad should not receive an identity document or a *laissez-passer* from the consul of the country which he wishes to visit. The same procedure might be adopted as regards countries of transit, unless the authorities of the countries of transit were willing—as, in fact, they probably would be—to visa the identity document or *laissez-passer* issued by the authorities of the country of destination. The consul would have to make sure of the identity of the applicant, and there would be no reason why he should not, for this purpose, utilise the documents issued by the "Manchukuo" authorities and called by the latter passports, *laissez-passer*, etc.

The above considerations, which apply to ordinary passports, apply with even greater force to diplomatic passports or diplomatic visas on diplomatic or ordinary passports.

VI. The Committee considers that States Members of the League of Nations can, without infringing the report adopted by the Assembly, make provision, if necessary, for replacing their consuls in Manchuria. The despatch of consuls under the circumstances does not imply recognition of "Manchukuo," as those agents are appointed for the purpose of keeping their Governments informed and protecting their nationals. Moreover, it is in conformity with the Assembly's recommendations that Governments should remind their consuls that, so far as possible, particularly in such contacts as their duties may lead them to make for that purpose, they should do nothing which could be interpreted expressly or by implication as a declaration that they regard the authorities established in Manchuria as the proper Government of the country.

Every Government may, when appointing its consuls in Manchuria, be guided by its special juridical situation as regards China, and, if necessary, by the precedents followed in certain parts of China, such as Canton, the authorities of which have not, at certain times, recognised the authority of the Central Governments.

VII. With reference to the Geneva Opium Convention of 1925, Chapter V, the Committee recommends to Members of the League and to interested States non-Members that applications for the export to "Manchukuo" territory of opium or other dangerous drugs should not be granted unless the applicant produces an import certificate in accordance with the Convention of such a nature as to satisfy the Government to which application is made that the goods in question are not to be imported into "Manchukuo" territory for a purpose which is contrary to the Convention. A copy of the export authorisation should accompany the consignment, but Governments

should refrain from forwarding a second copy of the export authorisation to "Manchukuo," since such action might be interpreted as a *de facto* recognition of "Manchukuo."

B. Consequences of Recognition and Nonrecognition in the Courts

§ 28. SUITS BY AND AGAINST RECOGNIZED AND UNRECOGNIZED GOVERNMENTS

Thus far the discussion has been of recognition as a phenomenon concerning the political departments of governments, those agencies having to do with the active conduct of foreign relations. But recognition also has consequences in the courts. States and governments recognized by the State where a court sits have one status; nonrecognized States and governments have another. Ordinarily the courts attempt as far as possible to give effect to the attitude taken by the agencies of their State entrusted constitutionally with the conduct of foreign relations, but this produces its own problems, some of which are examined in §§ 28-31 below. The case printed below illustrates the attitude of the courts towards suits in which a government, not recognized by the political departments of the government of the forum, seeks to appear as party plaintiff.

Russian Socialist Federated Soviet Republic *v.* Cibrario

UNITED STATES, COURT OF APPEALS OF NEW YORK, 1923

235 N. Y. 255.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department . . . affirming a judgment in favor of defendants entered upon an order of Special Term sustaining a demurrer to and directing a dismissal of the complaint.

[Argument of counsel omitted.]

ANDREWS, J. In *Wulfsohn v. Russian Federated Soviet Republic* (234 N. Y. 372) we held that our courts would not entertain jurisdiction of an action brought without its consent against an existing foreign government, in control of the political and military power within its own territory, whether or not such government had been recognized by the United States. We have now to determine whether such a government may itself become a plaintiff here.

If recognized, undoubtedly it may. (*Republic of Honduras v. De Soto*, 112 N. Y. 310; *United States of America v. Wagner*, L. R. 2 Ch. App. 582; *King of Spain v. Machado*, 4 Russ. 560; *King of Prussia v. Kuepper*,

22 Mo. 550.) Conceivably this right may depend on treaty. But if no treaty to that effect exists the privilege rests upon the theory of international comity. This is so with regard to all foreign corporations. . . . And except as limited by constitutional provisions the same thing is true of those not citizens of our state. Much more true is it that the right of a foreign government to sue is likewise based upon the same consideration. Neither a natural person nor a corporation, ordinarily we would not recognize it as a proper party plaintiff. (*W. & A. R. R. Co. v. Dalton Marble Works*, 122 Ga. 774.) It represents, however, the general interests of the nation over which it has authority. We permit it to appear and protect those interests as a body analogous to one possessing corporate rights, but solely because of comity. (*Republic of Honduras v. De Soto*, 112 N. Y. 310; *Hullet & Co. v. King of Spain*, 1 Dow & Clark, 169, 175; *Duke of Brunswick v. King of Hanover*, 6 Beav. 1, 37; *The Sapphire*, 78 U. S. [11 Wall.] 164.)

Comity may be defined as that reciprocal courtesy which one member of the family of nations owes to the others. It presupposes friendship. It assumes the prevalence of equity and justice. Experience points to the expediency of recognizing the legislative, executive, and judicial acts of other powers. We do justice that justice may be done in return. "What is termed the comity of nations is the formal expression and ultimate result of that mutual respect accorded throughout the civilized world by the representatives of each sovereign power to those of every other in considering the effects of their official acts. Its source is a sentiment of reciprocal regard, founded on identity of position and similarity of institutions." (*Fisher, Brown & Co. v. Fielding*, 67 Conn. 91, 108.)

As defined by Webster, comity "is in general terms that there are between nations at peace with one another rights both national and individual resulting from the comity or courtesy due from one friendly nation to another. Among these is the right to sue in their courts respectively." (6 Webster Works, 117.) It may, however, not be demanded as a right. It is yielded as a favor. Not an arbitrary favor. Nor is it the favor of the courts. "It is not the comity of the courts, but the comity of the nations which is administered." (*Bank of Augusta v. Earle*, 13 Pet. 519.) Rules of comity are a portion of the law that they enforce. Precedents mark the line that they should follow. Both in England and in the United States so universally and for such a length of time have actions by alien corporations and individuals been allowed that the right to bring them in a proper case has become fixed. Unless restrained by legislative fiat no court may now deny it. (*Hollis v. Drew Theological Seminary*, 95 N. Y. 166, 175; *Stone v. Penn Yan, K. P. and B. Railway Co.*, 197 N. Y. 279; *Christian Union v. Yount*, 101 U. S. 352.) So long as the plaintiff does not reside in a country at war with the United States we inquire no further. The original basis of the right has

fallen into the background. If trade is permitted between him and ourselves we do not ask whether he comes from Mexico or from France. But no like current of authority controls us in the case before us. Undisturbed the rule of comity is our only guide. This rule is always subject, however, to one consideration. There may be no yielding, if to yield is inconsistent with our public policy. We might give effect to the French decree in *Gould v. Gould* (235 N. Y. 14) only because it was consonant with our theories of marriage and divorce. Such public policy may be interpreted by the courts. It is fixed by general usage and morality or by executive or legislative declaration. Especially is the definition of our relations to foreign nations confided not to the courts, but to another branch of the government. The branch determines our policy toward them. It only remains for the courts to enforce it.

The use of the word "comity" as expressing the basis of jurisdiction has been criticized. It is, however, a mere question of definition. The principles lying behind the word are recognized. Whether or not we sum them up by one expression or another, the truth remains that jurisdiction depends upon the law of the forum, and this law in turn depends upon the public policy disclosed by the acts and declarations of the political departments of the government.

Does any rule of comity then require us to permit a suit by an unrecognized power? In view of the attitude of our government should we permit an action to be brought by the Soviet government? To both queries we must give a negative answer.

We may state at the outset that we find no precedent that a power not recognized by the United States may seek relief in our courts. Such intimations as exist are to the contrary. Statements are that "a recognized government may be a plaintiff." (*Republic of Honduras v. De Soto*, 112 N. Y. 310; *United States v. Wagner*, L. R. 2 Ch. App. 582, 589.) In *King of Spain v. Oliver* (14 Fed. Cas. 577) the Circuit Court noted the question but refused to decide it. In *City of Berne v. Bank of England*, (9 Ves. Jr. 347) Lord Eldon expressed great doubt. So in *Dolder v. Lord Huntingfield* (11 Ves. Jr. 283). In *The Penza* (277 Fed. Rep. 91) the present plaintiff was refused relief.

What then is the meaning and effect of recognition in its relation to comity? It is difficult to find a clear discussion of this question, either in reports or in text-books. Where a new government has seized power, "no official intercourse is possible between the powers refusing recognition and the state concerned." "Through recognition the other states declare that they are ready to negotiate with such individual (a new ruler) as the highest organ of his state." (Oppenheim, *International Law* [3d Ed.] Vol. 1, Sections 77, 342.) Speaking of the recognition of a new state, Wheaton (*International Law* [2d Ed.] p. 39) says: "So long, indeed, as the new state con-

finer its action to its own citizens and to the limits of its own territory, it may well dispense with such recognition. But if it desires to enter into the great society of nations, all the members of which recognize rights to which they are mutually entitled, and duties which they may be called upon reciprocally to fulfill, such recognition becomes essentially necessary to the complete participation of the new state in all the advantages of this society * * * The new state becomes entitled to the exercise of its external sovereignty as to those states only by whom that sovereignty has been recognized." In Hyde's *International Law* (Vol. 1, Sec. 37) is the statement that "the mode of recognition is not material, provided there be an unequivocal act indicating clearly that the new state is dealt with as such and is deemed to be entitled to exercise the privileges of statehood in the society of nations."

More assistance may be found in the reasons underlying various decisions of the courts as to the effect to be given to the acts of foreign governments. This effect depends upon our acknowledgment of the comity of nations. "The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency." (*Oetjen v. Central Leather Co.*, 246 U. S. 297, 303; *Mighell v. Sultan of Johore*, 1 Q. B. 1894, p. 149; *The Parlement Belge*, 5 Pro. Div. 1880, 197.) Therefore, where comity exists between two nations, and no question of public policy arises this rule is invariable. Yet in specific cases the question of recognition is thought controlling—recognition existing at the time the alleged wrongful act was done, or recognition later, which relates back to that time. (*Oetjen v. Central Leather Co.*, *supra*; *Underhill v. Hernandez*, 168 U. S. 250; *Ricaudo v. American Metal Co.*, 246 U. S. 304; *The Gagara*, [L. R.] Pro. Div. 1919, p. 95; *The Annette*, Id. p. 105.) A most interesting case is *Luther v. Sagor* (3 K. B. 1921, 532). The Soviet Republic seized personal property belonging to the plaintiff. Then sold to the defendant, it was imported into England. There the plaintiff brought an action to recover it. The plaintiff succeeded in the lower court, there being no proof of the recognition of the Russian government. Later such recognition occurred, and the judgment because of that fact was reversed on appeal. In the course of his opinion SCRUTTON, L. J., says the title to the goods coming into the hands of a purchaser from the Russian government cannot be questioned. "This immunity follows from recognition as a sovereign state. Should there be any government which appropriates other persons' property without compensation the remedy appears to be to refuse to recognize it as a sovereign state. Then the courts could investigate the title without infringing the comity of

nations." Why? Obviously because in the absence of recognition no comity exists.

We reach the conclusion, therefore, that a foreign power brings an action in our courts not as a matter of right. Its power to do so is the creature of comity. Until such government is recognized by the United States, no such comity exists. The plaintiff concededly has not been so recognized. There is, therefore, no proper party before us. We may add that recognition and consequently, the existence of comity, is purely a matter for the determination of the legislative or executive departments of the government. Who is the sovereign of a territory is a political question. In any case where that question is in dispute the courts are bound by the decision reached by those departments. (*Jones v. U. S.*, 137 U. S. 202; *Luther v. Sagor*, *supra*, 556.) It is not for the courts to say whether the present governments of Russia or Mexico or Great Britain should or should not be recognized. They are or they are not. That is as far as we may inquire. Nor is anything here decided inconsistent with *Wulfsohn v. Soviet Republic* (*supra*). Upon the facts in that case, if the defendant was not an existing government it might not be sued. There was no party before the court. If it were, as was alleged and admitted, the same result followed not because of comity, but because an independent government is not answerable for its acts to our courts.

We are the more ready to reach this conclusion because to hold otherwise might tend to nullify the rule that public policy must always prevail over comity. More than once during the last 70 years our relations with one or another existing but unrecognized government have been of so critical a character that to permit it to recover in our courts funds which might strengthen it or which might even be used against our interests would be unwise. We should do nothing to thwart the policy which the United States has adopted. Yet unless recognition is the test of the right to sue, we do not see why Maximilian as emperor of Mexico might not have maintained an action here.

With regard to the present Russian government the case is still stronger, even did comity not depend on recognition. We not only refuse to recognize it. Our State Department gives the reasons. Secretary Colby has stated them in an official note, dated August 10, 1920. He begins by saying that our government will not participate in any plan for the expansion of the armistice negotiations between Russia and Poland into a general European conference, "which would in all probability involve two results, from both of which this country strongly recoils, viz.: The recognition of the Bolshevik regime and a settlement of the Russian problem almost inevitably upon the basis of a dismemberment of Russia." [The further reasons of Secretary Colby are omitted.]

Our government has not receded from this position. Secretary Hughes in rejecting trade proposals of the Soviet, said on March 25, 1921, "It is only in the productivity of Russia that there is any hope for the Russian people, and it is idle to expect resumption of trade until the economic bases of production are securely established. Production is conditioned upon the safety of life, the recognition by firm guaranties of private property, the sanctity of contract and the rights of free labor," and he postpones any consideration of trade relations until such time as our government has convincing evidence of fundamental changes that will fulfill these conditions.

In the face of these declarations it is impossible to hold that to-day any such relations exist between the United States and Russia as call upon our courts to enforce rules in favor of the latter depending on the comity of nations.

The judgment appealed from should be affirmed, with costs.

§ 29. SUITS BY AND AGAINST RECOGNIZED AND UNRECOGNIZED GOVERNMENTS (*Continued*)

NOTE BY THE EDITOR

A foreign Sovereign, if recognized, may sue in the courts of the recognizing State. *Emperor of Austria v. Day and Kossuth* (1861) 3 De Gex, Fisher and Jones, 217. In the United States he may sue also in State courts, *King of Prussia v. Kuepper's Administrator*, 22 Mo. 550. But a recognized sovereign may not be sued in the courts, *Mighell v. Sultan of Johore* (1894) 1 Q. B. 149; and see *Schooner Exchange v. M'Faddon*, below, § 54, and *Berizzi Bros. v. Pesaro*, below, § 55. But if a recognized sovereign sues, he may be made a defendant to a crossbill or bill of discovery in the nature of a defense to the proceeding which he has instituted, *South African Republic v. La Compagnie Franco Belge du Chemin de Fer du Nord*, L. R. 1898 1 Ch. 190.

A government, however, may not sue in the courts of a State which has not recognized it, *Russian Socialist Federated Soviet Republic v. Cibrario*, above; or which has recognized a new government in its stead, *Haile Selassie v. Cable and Wireless, Ltd.* (1938) 55 Times Law Reports 209. Nor may such an unrecognized sovereign be sued, although the reasoning in the leading case of *Wulfsohn v. Russian Socialist Federated Soviet Republic* (1923) 234 N. Y. 372, 138 N. E. 24, seems confused. The question certified was whether the unrecognized Soviet government could be sued as a foreign corporation. The Court's negative answer was grounded on the fact that the Soviet government exercised *de facto* control over its territory, and (apparently) that to subject it to suit would lead to the same inconvenience as if it

were a recognized sovereign. A more logical answer would have been that an unrecognized government as such had no existence at all before our courts.

The anomalies which flow from established doctrine are illustrated when recognition is withheld for a long period after the new government in the foreign State has established *de facto* control. The United States withheld recognition from the Soviet government for what seemed to it good and sufficient reasons, for sixteen years. During that period accepted doctrines compelled the courts not only to deny standing to the Soviet government, but to allow the last legally accredited representative of Russia (the representative of the Kerensky Provisional Government of 1917) to sue, *Lehigh Valley R. R. Co. v. State of Russia* (1927) 21 F. (2d) 396, and to claim the established exemption of a recognized sovereign from suit, *The Rogdai* (1920) 278 F. 294. Thus the representative in the United States of a government which had no shred of authority in Russia exercised on his own responsibility the rights and privileges of a sovereign State in United States courts. In the exercise of such right by the representatives of a recognized sovereign, any abuse may be made the subject of representations to the sending sovereign. Where there is no longer any such sovereign, as in the Russian case, the representative of the defunct government becomes irresponsible. See generally Jaffe, *Judicial Aspects of Foreign Relations* (1933) Chaps. II-IV; and references cited under (b) at the end of this chapter.

§ 30. VALIDITY OF ACTS PERFORMED IN THE JURISDICTION OF RECOGNIZED AND UNRECOGNIZED GOVERNMENTS, BEFORE COURTS OF THE RECOGNIZING OR NONRECOGNIZING STATE

The case printed below illustrates the usual attitude taken by the courts towards acts of a foreign government relating to property within its jurisdiction (a) when the foreign government is not recognized by the State of the forum, and (b) when the foreign government is so recognized.

Luther v. Sagor & Company

GREAT BRITAIN, COURT OF APPEAL

[1921] 3 K. B. 532.

Appeal from the judgment of Roche J. in an action tried before the learned judge without a jury.

The plaintiffs were a company incorporated in 1898 in the Empire of Russia according to the laws of Russia. Their head office was at Reval, where they had a factory for the manufacture of veneer or plywood. They also had

a factory or mill at Staraja Russa, about 140 miles south of Petrograd, and there in the year 1919 they had a large stock, not less than 1500 cubic metres, of manufactured boards stamped with the name "Venesta" or the letters "V. L.," the name or trade mark of Venesta, Ltd., a British company.

On June 20, 1918, a confiscatory decree purporting to issue from the Government of Russia was passed. The following translation was accepted by the parties in the Court below as giving the meaning of the material portions of the decree. . . .

"By Article 1: All industrial and commercial establishments mentioned below with their capital and assets of whatever nature are declared the property of the Russian Socialist Federative Republic (*inter alia*);

"(17) All the mechanical saw mills of limited or private companies which have a capital of at least 1,000,000 roubles;

"(18) All woodworking establishments equipped with machinery which belonged to private or limited companies . . ."

In January, 1919, certain Commissaries or officials armed with authority from the Soviet Government took possession of the plaintiffs' factory or mill at Staraja Russa and of the manufactured goods lying there.

On August 14, 1920, a contract was made in London between L. B. Krassin, the representative of the Russian Commercial Delegation in London, and the defendants whereby Krassin on behalf of the Russian Commercial Delegation sold to the defendants, a firm carrying on business in London, a quantity of birch, alder, and aspen plywood including the 1500 cubic metres of plywood seized by the Commissaries as above stated. The contract was signed on behalf of the Russian Commercial Delegation by "Commissary to Foreign Trade, Krassin; Secretary, Klishko." It was under the seal of the Agents of the Soviets of the People's Commissaries. Under this contract the defendants obtained possession of the 1500 cubic metres of plywood boards and imported them into England.

The plaintiffs claimed a declaration that these goods were their property; an injunction restraining the defendants their servants and agents from selling, pledging, or in any way dealing with them; and damages for conversion and detention of them. The defendants contended that the decree of June 20, 1918, and the subsequent seizure of the goods and sale of them to the defendants were the acts of the Russian Socialist Federal Soviet Republic, a sovereign state, and were valid and effectual to deprive the plaintiffs of the property in the goods and to transfer the same to the defendants.

The following letters relating to the position of L. B. Krassin, the Russian Commercial Delegation, and the Russian Socialist Federal Soviet Republic were received in evidence before Roche J.:

(1) A letter dated July 28, 1920, written on behalf of His Majesty's Secretary of State for Foreign Affairs to the solicitors for L. B. Krassin. It

stated that Krassin was the authorized representative of the Soviet Government and had been received by His Majesty's Government for the purpose of carrying out certain negotiations. It further stated that His Majesty's Secretary of State regarded Krassin as a foreign representative and as one who in view of the negotiations should be exempt from the process of the Courts.

(2) A letter of October 5, 1920, written on behalf of His Majesty's Secretary of State for Foreign Affairs to the defendants' solicitors which stated that: "His Majesty's Government assent to the claim of the Delegation to represent in this country a State Government of Russia."

(3) A letter dated November 27, 1920, written on behalf of His Majesty's Secretary of State for Foreign Affairs to the plaintiffs' solicitors which stated that "for a certain limited purpose His Majesty's Government has regarded Monsieur Krassin as exempt from the process of the Courts, and also for the like limited purpose His Majesty's Government has assented to the claim that that which Monsieur Krassin represents in this country is a State Government of Russia, but that beyond these propositions the Foreign Office has not gone, nor moreover do these expressions of opinion purport to decide difficult and, it may be, very special questions of law, upon which it may become necessary for the Courts to pronounce. I am to add that His Majesty's Government have never officially recognized the Soviet Government in any way. . . ."

Roche J. upon the evidence before him found that His Majesty's Government had not recognized the Russian Soviet Government as the government of a sovereign state or power. He also found that the plaintiffs had not become an Esthonian company but had elected to remain a Russian company, which the treaty of February 2, 1920, enabled them to do. He therefore gave judgment for the plaintiffs.

The defendants appealed.

After the date of the judgment further information was obtained from the Foreign Office touching the status of the Soviet Government of Russia. The appellants applied for and obtained leave to bring this further information before the Court. . . .

On March 16, 1921, a trade agreement was executed between His Majesty's Government and the Government of the Russian Socialist Federal Soviet Republic. It was signed at London by Sir R. S. Horne on behalf of His Majesty's Government and by L. Krassin on behalf of the Russian Soviet Government. By clause 10 of this agreement the Russian Soviet Government undertook "to make no claim to dispose in any way of the funds or other property of the late Imperial and Provisional Russian Governments in the United Kingdom." His Majesty's Government gave a corresponding undertaking as regards British Government funds and property in Russia.

Arguments of counsel are omitted.

BANKES, L. J. The action was brought to establish the plaintiff company's right to a quantity of veneer or plywood which had been imported by the defendants from Russia. The plaintiffs' case was that they are a Russian company having a factory or mill at Staraja Russa in Russia for the manufacture of veneer or plywood, and that in the year 1919 the so-called Republican Government of Russia without any right or title to do so seized all the stock at their mill and subsequently purported to sell the quantity in dispute in this action to the defendants. The plaintiffs contended that the so-called Republican Government had no existence as a Government, that it had never been recognized by His Majesty's Government, and that the seizure of their goods was pure robbery. As an alternative they contended that the decree of the so-called government nationalizing all factories, as a result of which their goods were seized, is not a decree which the Courts of this country would recognize.

The answer of the defendants was two-fold. In the first place they contended that the Republican Government which had passed the decree nationalizing all factories was the *de facto* Government of Russia at the time, and had been recognized by His Majesty's Government as such, and that the decree was one to which the Courts of this country could not refuse recognition. Secondly they contended that the plaintiff company was an Esthonian and not a Russian company, and that as a result of the provisions of the treaty of peace between Russia and Esthonia the plaintiffs' complaint must be dealt with by a commission set up in pursuance of art. xiv. of that treaty. Roche, J., decided the two main points in the plaintiffs' favour. Upon the evidence which was before the learned judge I think that his decision was quite right. As the case was presented in the Court below the appellants relied on certain letters from the Foreign Office as establishing that His Majesty's Government had recognized the Soviet Government as the *de facto* Government of Russia. The principal letters are referred to by the learned judge in his judgment. He took the view that the letters relied on did not establish the appellants' contention. In this view I entirely agree.

In this Court the appellants asked leave to adduce further evidence, and as the respondents raised no objection, the evidence was given. It consisted of two letters from the Foreign Office dated respectively April 20 and 22, 1921. The first is in reply to a letter dated April 12, which the appellants' solicitors wrote to the Under-Secretary of State for Foreign Affairs, asking for a "certificate for production to the Court of Appeal that the Government of the Russian Socialist Federal Soviet Republic is recognized by His Majesty's Government as the *de facto* Government of Russia." To this request a reply was received dated April 20, 1921, in these terms: "I am directed by Earl Curzon of Kedleston to refer to your letter of April 12, asking for information as to the relations between His Majesty's Govern-

ment and the Soviet Government of Russia. (2) I am to inform you that His Majesty's Government recognize the Soviet Government as the de facto Government of Russia." The letter of April 22 is in reply to a request for information whether His Majesty's Government recognized the Provisional Government of Russia, and as to the period of its duration, and the extent of its jurisdiction. The answer contains (inter alia), the statement that the Provisional Government came into power on March 14, 1917, that it was recognized by His Majesty's Government as the then existing Government of Russia, and that the Constituent Assembly remained in session until December 13, 1917, when it was dispersed by the Soviet authorities. The statement contained in the letter of April 20 is accepted by the respondents' counsel as the proper and sufficient proof of the recognition of the Soviet Government as the de facto Government of Russia.

Under these circumstances the whole aspect of the case is changed, and it becomes necessary to consider the matters which were not material in the Court below. The first is a question of law of very considerable importance—namely, what is the effect of the recognition by His Majesty's Government in April, 1921, of the Soviet Government as the de facto Government of Russia upon the past acts of that Government, and how far back, if at all, does that recognition extend. The second is a question of fact, whether sufficient evidence was given to establish the identity of the Soviet Government now recognized by His Majesty's Government with the Government which seized and confiscated and sold the appellants' goods.

On the first point counsel have been unable to refer the Court to any English authority. Attention has been called to three cases decided in the Supreme Court of the United States: *Williams v. Bruffy*, 96 U. S. 176; *Underhill v. Hernandez*, 168 U. S. 250; *Oetjen v. Central Leather Co.*, 246 U. S. 297. In none of these cases is any distinction attempted to be drawn in argument between the effect of a recognition of a Government as a de facto Government and a recognition of a Government as a Government de jure, nor is any decision given upon that point; nor, except incidentally, is any mention made as to the effect of the recognition of a Government upon its past acts. The mention occurs in two passages, one in the judgment of Field, J., in *Williams v. Bruffy*, 96 U. S. at page 186, where, after discussing the essential differences between the Government of the Confederate States and the two kinds of de facto governments which he says may exist, he explains that the second of the two kinds exists where a portion of the inhabitants of the country have separated themselves from the parent State and established an independent government. "The validity of its acts," he says, "both against the parent state and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it. If it succeed, and become recognized, its acts from the commencement of its

existence are upheld as those of an independent nation." The second mention of the point occurs in the judgment of Fuller C. J., in *Underhill v. Hernandez*, [168 U. S. at page 253]. He says, in speaking of civil wars: "If the party seeking to dislodge the existing government succeeds, and the independence of the government it has set up is recognized, then the acts of such government from the commencement of its existence are regarded as those of an independent nation."

These are weighty expressions of opinion on a question of international law. Neither learned judge cites any authority for his proposition. Each appears to treat the matter as one resting on principle. On principle the views put forward by these learned judges appear to me to be sound, though there may be cases in which the Courts of a country whose government has recognized the government of some other country as the de facto government of that country may have to consider at what stage in its development the government so recognized can, to use the language to which I have already referred of those learned judges, be said to have "commenced its existence." No difficulty of that kind arises in the present case, because upon the construction which I place upon the communication of the Foreign Office to which I have referred, this Court must treat the Soviet Government, which the Government of this country has now recognized as the de facto Government of Russia, as having commenced its existence at a date anterior to any date material to the dispute between the parties to this appeal.

An attempt was made by the respondents' counsel to draw a distinction between the effect of a recognition of a government as a de facto government and the effect of a recognition of a government as a government de jure, and to say that the latter form of recognition might relate back to acts of state of a date earlier than the date of recognition, whereas the former could not. Wheaton (*International Law*, 5th English edition 1916 p. 36) quoting from Montague Bernard, states the distinction between a de jure and a de facto government thus: "A de jure government is one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them. A de facto government is one which is really in possession of them, although the possession may be wrongful or precarious." For some purposes no doubt a distinction can be drawn between the effect of the recognition by a sovereign state of the one form of government or of the other, but for the present purpose in my opinion no distinction can be drawn. The Government of this country having, to use the language just quoted, recognized the Soviet Government as the Government really in possession of the powers of sovereignty in Russia, the acts of that Government must be treated by the Courts of this country with all the respect due to the acts of a duly recognized foreign sovereign state.

It becomes material now to consider whether the appellants have given sufficient evidence to establish that the confiscation and subsequent sale of the respondents' property were the acts of the Government which His Majesty's Government have now recognized as the de facto Government of Russia. In my opinion they have. The decree of confiscation as set out in the judgment of Roche J. as reported in 1921 1 K. B. 470, purports to be "A decree of Council of Commissars for the People." The contract of sale of the goods to the appellants dated August 14, 1920, purports to be made by L. B. Krassin on behalf of the Russian Commercial Delegation. The trade agreement between this country and Russia of March 16, 1921, is made between His Majesty's Government and the Government of the Russian Socialist Federal Soviet Republic, thereafter referred to as the Russian Soviet Government, and is signed by M. Krassin as the representative of that Government. From the letter from the Foreign Office addressed to Messrs. Linklater of April 22, 1921, it appears that the Soviet authorities dispersed the then Constituent Assembly on December 13, 1917, from which date I think it must be accepted that the Soviet Government assumed the position of the sovereign Government and purported to act as such. The witness Rastorgoueff explained that the Council of Commissars for the People is the executive body of the Soviet Republic. The witness Schotter deposed to the seizure of the plaintiffs' goods at the factory being made by persons holding official documents from the Soviet Government, and to the fact that at that time and up to the date of the trial the power (as he expressed it) was in the hands of the Bolsheviks. The witness Muller who described himself as confidential clerk to the Russian Trade Delegation of the Russian Socialist Federal Soviet Republic, of which M. Krassin was the head, deposed to the fact that since the end of 1917 the Russian Socialist Federal Soviet Republic had in fact been ruling over that part of Russia in which the plaintiffs' factory at Staraja Russa is situate. Upon these materials I consider that it is established that the decree of confiscation of June 20, 1918, the seizure of the plaintiffs' goods in January, 1919, and the subsequent sale of them to the defendants in August, 1920, were all acts of the Soviet Government which has now been recognized by His Majesty's Government as the de facto Government of Russia, and must be accepted by the Courts of this country as such.

It is necessary now to deal with the point made by the respondents that the decree of confiscation of June, 1918, even if made by the Government which is now recognized by His Majesty's Government as the de facto Government of Russia, is in its nature, so immoral and so contrary to the principles of justice as recognized by this country, that the Courts of this country ought not to pay any attention to it. This is a bold proposition. The question before the Court is not one in which the assistance of the Court if asked to enforce the law of some foreign country to which legitimate objection might

be taken, as in *Hope v. Hope*, (1857) 8 D.M. & G. 731, and *Kaufman v. Gerson*, (1904) 1 K. B. 591. The question before the Court is as to the title to goods lying in a foreign country which a subject of that country, being the owner of them by the law of that country, has sold under an f. o. b. contract for export to this country. The Court is asked to ignore the law of the foreign country under which the vendor acquired his title, and to lend its assistance to prevent the purchaser dealing with the goods. I do not think that any authority can be produced to support the contention. [The discussion of the authorities is omitted.] . . . The respondents' position is rendered all the more difficult from the fact that the vendor in the present case is a duly recognized sovereign state whose law conferred the title which is challenged. Even if it was open to the Courts of this country to consider the morality or justice of the decree of June 20, 1918, I do not see how the Courts could treat this particular decree otherwise than as the expression by the de facto government of a civilized country of a policy which it considered to be in the best interest of that country. It must be quite immaterial for present purposes that the same views are not entertained by the Government of this country, are repudiated by the vast majority of its citizens, and are not recognized by our laws. Taking the view I do of the point I do not consider it necessary to discuss the authorities to which our attention has been called. . . .

[Concurring opinions of Warrington and Scrutton, L. JJ., omitted.]

Appeal Allowed.

§ 31. VALIDITY OF ACTS PERFORMED IN THE JURISDICTION OF RECOGNIZED AND UNRECOGNIZED GOVERNMENTS, BEFORE COURTS OF THE RECOGNIZING OR NONRECOGNIZING STATE (*Continued*)

NOTE BY THE EDITOR

On the strength of a Foreign Office statement that "H. M.'s Government in the United Kingdom have not recognized the Italian annexation of Ethiopia *de jure* but they now recognize the Italian Government as the government *de facto* of the parts of Ethiopia which they control," the Chancery Division of the British High Court of Justice held good an Italian decree dissolving the Bank of Ethiopia, which could thus not maintain an action for an accounting. *Bank of Ethiopia v. National Bank of Egypt and Liguori* (1937) 53 T. L. R. 751; printed in 31 *A. J. I. L.* (1937) 742. See also comment of Wright at p. 683. Established doctrine still seems to be that of the lower court in *Luther v. Sagor*, that the acts of unrecognized governments with respect to matters within their jurisdiction will not be given effect in the courts of the nonrecognizing State. *Fred S. James and Co. v. Second Russian*

Reinsurance Co., 239 N.Y. 248, 146 N.E. 369. Jaffe says, "The French, Italian, and Egyptian courts have stoutly held that prior to recognition the Soviet law must be ignored," but believes that French and Swiss courts do not concern themselves in this type of cases with the question of recognition. *Judicial Aspects of Foreign Relations* (1933) 189, 198. See *U.S.S.R. v. Compagnie Ropit* (1925), Sirey, *Recueil Général*, 1926, II, p. 1, and 1929, I, p. 17 (Court of Cassation). Logically this doctrine leads to peculiar consequences: for example, it might invalidate marriages and private contracts made under the law of the unrecognized government, merely because of the absence of political recognition.

Normal principles of "private international law" or "conflict of laws" afford a solution to such difficulties by permitting courts in one State to give effect to the public acts of another done within the second State's jurisdiction, on a basis somewhat similar to that provided by the United States Constitution for acts of the American States in the courts of other American States: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." (Art. IV, Sec. 1.) This principle is said sometimes to result from "comity," which in the *Cibario* case above (§ 28) was held not to exist in the absence of recognition. Whatever its basis, there is one clearly established exception to the principle: that a right acquired under the law of another State will not be enforced if it is of such nature that its enforcement would be contrary to the public policy of the State where enforcement is sought. This is called in certain continental jurisdictions "the exception of public order." Both the principle itself and the exception are somewhat vague, but there are writers who contend that, if they were applied by the courts to the acts of unrecognized governments and States, they would resolve present difficulties. It is contended that the application of the main principle would permit the general validation of ordinary private legal relations—on which, it is contended, the political act of nonrecognition should not be permitted to have damaging effects; and that the application of the exception of "public policy" or "public order" would prevent the giving of effect by the courts to policies and legislation of the foreign government which might have been influential in leading the political authorities of the State of the forum to refuse recognition. See Dickinson, "The Unrecognized Government or State in English and American Law," 22 *Michigan Law Review* (1923), 29, 118; "Recognition Cases, 1925-1930," 25 *A.J.I.L.* (1931) 214; "The Case of Salimoff and Co.," 27 *A.J.I.L.* (1933) 743; Borchard, "The Unrecognized Government in American Courts," 26 *A.J.I.L.* (1932) 261; Jaffe, *Judicial Aspects of Foreign Relations* (1933).

To some extent, there is judicial precedent for these suggestions. As early as 1869 the United States Supreme Court gave wide effect to laws of the Confederate States which were not political in character. *Texas v. White*,

7 Wall. 700. In 1915 the New Jersey Court validated acts of the Carranza government in Mexico on the ground that this government exercised *de facto* control, and without reference to the question of recognition by the United States. *O'Neill v. Central Leather Co.*, 87 N.J.L. 552, 94 A. 789. In 1918, however, the United States Supreme Court validated the acts of the same government on grounds of subsequent recognition. *Oetjen v. Central Leather Co.*, 246 U.S. 297. But see *Underhill v. Hernandez* (1897) 168 U.S. 250. In *Sokoloff v. National City Bank* (1924) 239 N.Y. 158, at 166, the New York Court of Appeals stated in a dictum that "if violence to fundamental principles of justice or to our own public policy might otherwise be done," the courts might take account of acts of an unrecognized foreign government.

In *Russian Reinsurance Co. v. Stoddard*, 240 N.Y. (1925) 149, the principle of this dictum was given effect to prevent the directors of a nationalized Russian company from recovering a fund deposited in a New York bank. In giving judgment for the bank, the court gave effect to the Russian decrees of nationalization although the U.S.S.R. had not yet been recognized. "The primary question presented is not whether the courts of this country will give effect to such decrees, but is rather whether within Russia, or elsewhere outside of the United States, they have actually attained such effect as to alter the rights and obligations of the parties in a manner we may not in justice disregard, regardless of whether or not they emanate from a lawfully established authority." The establishment of a government in *de facto* control "must profoundly affect . . . all the relations of those who live within the territory. Its rule may be without lawful foundation; but lawful or unlawful, its existence is a fact and that fact cannot be destroyed by juridical concepts. The State Department determines whether it will regard its existence as lawful, and until the State Department has recognized the new establishment, the court may not pass upon its legitimacy or ascribe to its decrees all the effect which inheres in the laws or orders of a sovereign. The State Department determines only that question. It cannot determine how far the private rights and obligations of individuals are affected by acts of a body not sovereign or with which our government will have no dealings. That question does not concern our foreign relations. It is not a political question but a judicial question." The court concluded that the corporation "is in fact without existence in Russia. . . . It exists here solely by force of the juridical conception which we have pointed out should not be carried beyond the limits of common sense and justice." But in a later case, *Petrogradsky . . . Bank v. National City Bank*, 250 N.Y. (1930) 23, the same court refused to give effect to Soviet decrees. In *Salimoff and Co. v. Standard Oil Co. of New York*, 262 N.Y. 220 (1933), decided before recognition, the same Court of Appeals found a way to give effect to the Soviet laws by an entirely different doctrine: that the State Department had in effect recognized the *de facto*

existence of the Soviet Government by a statement that "2. The Department of State is cognizant of the fact that the Soviet regime is exercising control and power in territory of the former Russian Empire and the Department of State has no disposition to ignore that fact. 3. The refusal of the Government to accord recognition to the Soviet regime is not based on the ground that that regime does not exercise control and authority in territory of the former Russian Empire, but on other facts." This was held to make the validity of Soviet decrees a matter for the determination of the New York courts. This position was in contrast to that of the lower court, which had reached the same result by flatly declaring that "the fact that the existence of a foreign power has been recognized or not by this country is of little importance so far as the enactment and enforcement of laws within the foreign jurisdiction are concerned, and where a foreign state exists in fact and is functioning as such within its borders, its laws must be given full force and effect." 237 App. Div. 686, at 693. This was not based on the statement of the State Department, and made *de facto* control a matter for judicial determination.

After recognition of the Soviet regime in 1933, the Court of Appeals of New York held Soviet monopolization and annulment decrees of 1918 applicable to insurance policies made in Russia under Russian law with an American insurance company, and barred recovery in New York. *Dougherty v. Equitable Life Assurance Co.*, 266 N.Y. 71, 193 N.E. 897. This is conventional, since recognition had made possible a return to normal conflict of laws doctrine. Likewise, recognition enabled the courts to give full effect to Soviet laws and decrees in some cases, and to refuse to do so in others where to give them full effect would be "contrary to public policy and shocking to our ideas of justice and equity." This return to normal conflict of laws doctrine resulted in permitting a nationalized Russian corporation to maintain an action to recover its assets. *Vladikavkazsky Railway Co. v. New York Trust Co.*, 263 N.Y. (1934) 369. The United States Supreme Court, however, shows a disposition to avoid the difficult job of determining which Soviet decrees are contrary to American public policy and which are not. In *United States v. Belmont*, 301 U.S. 324 (1937), the United States, as assignee of the U.S.S.R. under the Roosevelt-Litvinoff agreements, sought to recover money deposited by a nationalized Russian corporation with a New York private bank. The Supreme Court in effect permitted recovery, reversing the Circuit Court of Appeals, which had declared that to give effect to the Russian decrees in New York was contrary to public policy in that State. The Supreme Court declared: "We do not pause to inquire whether . . . there was any policy of the State of New York to be infringed, since we are of opinion that no state policy can prevail against the international compact here involved. . . . The effect of . . . [the establishment of normal diplomatic relations] was to

validate, so far as this country is concerned, all acts of the Soviet Government here involved from the commencement of its existence. . . . Plainly, the external powers of the United States are to be exercised without regard to State laws or policies. . . . The public policy of the United States relied upon as a bar to the action is that declared by the Constitution, namely, that private property shall not be taken without just compensation. But the answer is that our Constitution, laws, and policies have no extraterritorial operation, unless in respect of our own citizens. . . . The substantive right to the moneys, as now disclosed, became vested in the Soviet Government as the successor to the corporation; and this right of that government has passed to the United States. *It does not appear that respondents have any interest in the matter beyond that of a custodian. Thus far no question of the Fifth Amendment is involved.* (Italics are the editor's.) Apparently this judgment does not preclude a later one refusing to give effect to Soviet decrees as contrary to the national public policy of the Fifth Amendment (or even the Fourteenth) should adverse claims against the deposit be presented by American nationals, or possibly even by Russian nationals claiming under American law. There is a concurring opinion by Justices Stone, Brandeis, and Cardozo: "It does not appear that the State of New York, at least since our diplomatic recognition of the Soviet Government, has any policy which would permit a New York debtor to question the title of that government to a claim of the creditor acquired by its confiscatory decree." It is unnecessary to consider the agreement in this connection, since there is nothing to suggest that the United States "has either recognized or declared that any state policy is to be overriden." But see Jessup, "The Litvinoff Assignment and the Belmont Case," 31 *A.J.I.L.* (1937) 481.

§ 32. RECOGNITION OF BELLIGERENCY

The occasion upon which a State accords belligerent rights arises when a civil conflict exists within a foreign State. If the interests of the recognizing State are involved, and the position of the party contesting the control of the existing government has reached a certain magnitude, an outside State may grant the rebels the rights of belligerents, rights which they do not possess as against such State in the absence of such action. Recognition of belligerency "does not confer upon the community recognized all the rights of an independent State; but it grants to its government and subjects the rights and imposes upon them the obligations of an independent State in all matters relating to the war. It follows from this that the powers that give such recognition are bound to submit to lawful captures of their merchantmen made by the cruisers of the community recognized, or by those of the mother country. They must also respect effective blockades carried on by either side, and treat the officers and soldiers of the rebels as lawful combatants, no less than the officers and soldiers of the established gov-

ernment."—T. J. Lawrence, *Principles of International Law*, 7th Ed. (1923), pp. 328-329. Reprinted by special permission of D. C. Heath and Company.

The document below is of interest because it was influential in preventing the British Government from issuing a Proclamation of Neutrality (giving the Cretan insurgents belligerent rights), which would have imposed such burdens and responsibilities on the British Government.

**Opinion of Law Officers of the Crown (Karslake, Selwyn, and Phillimore),
Great Britain, August 14, 1867**

Reprinted from H. A. Smith, *Great Britain and the Law of Nations*, I, 262-265. By permission of Professor Smith and P. S. King & Son, Ltd.

"We are honoured with your Lordship's commands signified in Mr. Hammond's letter of the 5th inst. stating that the Papers which, by the direction of your Lordship, he then enclosed, and some of which had been recently under our consideration, go to shew that measures are being actively taken by certain parties at Liverpool to equip Cruizers to be employed against Turkey in aid of the Cretan Insurrection; and looking at these objections with reference to the announcement of the so-called Provisional Government in Crete of their intention to issue Letters of Marque with the view of assailing Turkish Commerce, which formed the subject of Mr. Hammond's further letter of the same day's date.

"Mr. Hammond was to request Our Opinion as to the propriety of a Proclamation being issued under the Foreign Enlistment Act, warning Her Majesty's Subjects against taking any part in any such proceedings; and that if we should be of opinion that it should be proper to issue such a Proclamation, Mr. Hammond was to request that we would prepare the draft of one for Your Lordship's consideration.

"In obedience to Your Lordship's Commands We have considered these Papers, and have the Honour to Report,

"That the question submitted to us as to the propriety of issuing a Proclamation of Neutrality by Her Majesty, in the matter of the Cretan Insurrection, is one of great delicacy and grave importance.

"When a Civil War has broken out in the dominions of a Friendly State, and Armaments are brought into the Field, or upon the Sea, by the contending parties, it is undoubtedly competent for a Neutral State without any breach of International Law, to recognize both parties as belligerents and to declare herself Neutral between them.

"It is always a question of fact to be determined by the Government of the Neutral State, whether the Insurrection has or has not assumed the dimensions of War, and whether the legitimate interests of the Neutral State do or do not require that she should claim from both parties the performance towards her of the obligations incident to the *Status* of a belligerent;—according equally to both parties in return, and recognition of that *status*.

"This statement of fact cannot in our opinion be established by the mere assertion of a number of persons styling themselves 'Provisional Government':¹ many other circumstances must obviously be required before a Neutral State can be justified in recognizing, as Belligerents, persons in insurrection against the Government of a State with whom she is on terms of Amity. Amongst these considerations the length of time during which the contest has existed, the number, order, and discipline of the rebel forces; their subordination to a *de facto* existing Government, capable of maintaining International relations with Foreign States; the acts of the Government against whom the Rebels are in arms—both with respect to the Rebels themselves, and to Foreign States,—must obviously find place.

"We perceive that it is stated in these papers, that the Ottoman Government has declared the Ports of Crete to be in a state of Blockade: if so, we presume that it would have notified the fact of this declaration to Foreign States.

"We do not, however, know whether this be the case or not: but if the Ottoman Government does require from Foreign States the recognition of what is, strictly speaking, a Blockade, and not merely a right incident to every Independent State, of closing the ports of any part of its Dominions against Foreign Vessels;—if, in fact, the Ottoman Government has declared a formal Blockade, it would have no reason to complain if Foreign States simply recognized the Rebels as Belligerents: because a Blockade implies the existence of War and of two Belligerents at least, bound to respect the rights of Neutral States.

"We have thought it proper to make these general remarks in the hope that they may either assist Her Majesty's Government in forming a conclusion on the facts before them, or may induce Her Majesty's Government to lay before us the facts of which they are in possession, without which we are unable ourselves to arrive at a satisfactory conclusion on this subject.

"With respect to the question whether it be expedient that Her Majesty's Government should issue a Proclamation of Neutrality in order to restrain Her Majesty's Subjects from taking any part in this civil war—We have to observe, that, even without the issue of any such Proclamation, Her Majesty's Subjects cannot lawfully enlist themselves in the service of any Foreign State without the express permission of the Crown. It is true that such a Proclamation has been usual, and of late years been very generally issued, in order to admonish Her Majesty's Subjects that if they take any part in a war as to which Her Majesty is neutral, they will thereby infringe the law, disobey Her Majesty's Order, and will be entitled to no protection from Her

¹ For a recent example see the case of the *Annette*, (Law Reports, [1919] p. 105), which relates to the provisional government established at Archangel in opposition to the Bolsheviks. [Note by H. A. Smith.]

Majesty's Government. And if Her Majesty's Government should be of opinion upon the facts before them, that the insurgents have established what may be recognized as a Government, and that this insurrection has assumed the character of a war, we think it would be proper that such a Proclamation should issue, but not otherwise: for the issuing of such a Proclamation might operate as a public recognition of the existence of a state of war. We have, however, thought it right, subject to these observations, to prepare and append to our Report, a draft Proclamation drawn in conformity with the usual precedents; which draft, however, may require some alterations in order to meet the state of circumstances actually existing.

"There remains to be considered the important question relative to the declared intention of the so-called 'Provisional Government' of Crete, to issue Letters of Marque, and send forth Privateers.—We are of opinion that if this 'Provisional Government' is to be treated as a Belligerent *de facto*, they have a right according to the general principles of International Law to resort to this means of self-defence and of aggression against their enemy:—but if they are not entitled to the *status* of belligerents, and these Privateers sail upon the high seas under no Flag of any *de jure* or *de facto* Government, they would be liable to be treated generally as Pirate Vessels, and especially to be treated as such, if they should attempt to interfere in any way with Vessels of any Foreign State. This consideration still further increases the importance of the decision at which Her Majesty's Government may arrive, upon the facts before them, as to the issue of a Proclamation of Neutrality; which might as we have said, be a public recognition of the Insurgents as Belligerents." ²

Upon the back of this opinion there is the following note, initialed by Lord Stanley:—

"I think this a very good letter, and it confirms me in the opinion which I before entertained that to issue a proclamation at this moment would be inadvisable.
S."

§ 33. INSURGENCY

NOTE BY THE EDITOR

A controversy exists as to whether there is a clear-cut distinction between the status of belligerency and that of insurgency. Wilson, the leading authority on insurgency, says:

Insurgents are organized bodies of men who, for public political purposes, are in a state of armed hostility to an established government. There may be war in the "material sense" which, because belligerency has not been recognized,

² F.O. 83/2396. [Note by H. A. Smith.]

has not become war in the "legal sense"; nevertheless, those engaged may have legal war status.

The Three Friends, 166 U.S. 1 (1897), is usually cited to establish this difference. Wilson goes on to describe the effect of *admission* (not recognition) of insurgency as follows:

The practice of tacitly *admitting* insurgent rights has become common when the hostilities have assumed such proportions as to jeopardize the sovereignty of the parent state over the rebelling community, or seriously to interfere with customary foreign intercourse. In general, it may be said that: (1) Insurgent rights cannot be claimed by those bodies seeking other than political ends. (2) Insurgent acts are not piratical, as they imply the pursuit of "public as contrasted with private ends." (3) The *admission* of insurgent rights by a foreign state does not carry the rights of a belligerent, nor imply official *recognition* of the political status of the insurgent body. (4) The *admission* of insurgent rights does not change the responsibility of the parent state for acts committed within its jurisdiction. (5) When insurgents act in a hostile manner toward foreign states, they may be turned over to the parent state, or may be punished by the foreign state. (6) A foreign state must in general refrain from interference in the hostilities between parent state and insurgents, i. e., cannot extend hospitality of its ports to insurgents, extradite insurgents, etc., though it may intern them. (7) When insurgency exists, the armed forces of the insurgents must observe and are entitled to the advantages of the laws of war in their relations to the parent state.¹

Objections to insurgency being considered a legal status separate from belligerency are summarized in Briggs, *Law of Nations* (1938), pp. 744-749. It is probable, however, that States will continue in practice to accord some war rights to armed groups contesting for political power against a recognized State, without incurring the onerous responsibilities which the recognition of belligerency entails. Such appeared to be the position of certain States in the Spanish Civil War, in which Great Britain and France, for example, long declined to recognize the belligerency of the Franco Government. This situation was hardly sufficiently described as one of peace. It seems better to regard insurgency as a separate legal status, even if all its incidents are not clear.

One of the most important practical questions in this connection is whether the recognized government authorities have power to close to the commerce of outside ("neutral") States ports over which insurgents have *de facto* control. The doctrine generally accepted is that of the umpire in the British-Venezuelan arbitrations in allowing damages against Venezuela for

¹ *International Law*, 9th Ed. (1935), pp. 66-68. By permission of the author, George Grafton Wilson, and the publisher, Silver Burdett Company. See also Wilson, "Insurgency," *Lectures*, Naval War College, 1900, and *Convention on Rights and Duties of States in the Event of Civil Strife* (Havana, 1928), § 188 below.

refusing clearance to vessels bound for ports in control of Venezuelan insurgents: "To close ports which are in the hands of revolutionists by government decree or order is impossible under international law. It [the Venezuelan Government] may in a proper way and under proper circumstances and conditions in time of peace declare what of its ports shall be open and what of them shall be closed. But when these ports or any of them are in the hands of foreign belligerents or of insurgents, it has no power to close or to open them, for the palpable reason that it is no longer in control of them. It has then the right of blockade alone, which can only be declared to the extent that it has the naval power to make it effective in fact."² This was the position taken by the United States in 1936 when the Spanish Government attempted to prevent the entry of merchant ships into "war zones" controlled by the insurgents. The American Government declared that it could not "admit the legality of any action on the part of the Spanish Government in declaring ports closed unless the Government declares and maintains an effective blockade of such ports. In taking this position, the American Government is guided by a long line of precedents in international law with which the Spanish Government is doubtless familiar."³ Considerable discussion of the rule as stated was occasioned by the Award of the United States-Mexico General Claims Commission under the Convention of 1923 in the claim of the United States on behalf of the *Oriental Navigation Company*. In this case, a Mexican war vessel had ordered off a vessel, under charter to an American corporation, from a port which the Mexican Government had ordered closed. The American Government had previously, with respect to the closure, taken the same position it took in Spain. But the Commission, while admitting the validity of the generally accepted rule, disallowed the claim of the United States, because "in the present case, it cannot be fairly said that the port of Frontera was in the hands of insurgents at the time when the events in question took place. It was in fact partly commanded by the *Agua Prieta*."⁴ Thus the Commissioners appeared to view the particular control exercised by the war vessel as ordinary peacetime control by Mexican authorities of their own ports, and not as an exercise either of the closure or of a blockade. The whole problem is discussed by Dickinson, "The Closure of Ports in Control of Insurgents," 24 *A.J.I.L.* (1930), 69, and Briggs, *Law of Nations* (1938), pp. 745-749.

² *Compagnie Générale des Asphaltes de France*, Ralston's Report, *Venezuelan Arbitrations of 1903*, pp. 336-337.

³ *Press Releases*, No. 361 (August 29, 1936), p. 192.

⁴ *Opinions of Commissioners* (1929), p. 29, as printed in 23 *A.J.I.L.* (1929), 434, 436.

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QUESTIONS AND PROBLEMS

Students are urged to read all the materials in the chapter before attempting to deal with the questions and problems.

1. What is recognition? Is there any difference between the recognition of a *State* and the recognition of a *government*? Can you illustrate your answer from materials in this chapter? Is there any difference between *de facto* and *de jure* recognition? Can you illustrate your answer from materials in this chapter? What is meant by recognition of belligerency? Does this always involve recognition of a new State? What is meant by recognition of insurgency? Does this involve recognition of belligerency? Of a new State? What is the value of recognition of these various types to the recognized entity?
2. What authorities, from your consideration of the materials in this chapter, determine what is to be recognized and when it is to be recognized? Is Secretary Stimson, in § 22, dealing with the same kind of question as that which concerns the New York Court of Appeals in *R.S.F.S.R. v. Cibrario*, § 28? Does *Luther v. Sagor* (§ 30) shed further light on this question?
3. According to Secretary Stimson (§ 22) what is the traditional recognition policy of the United States? Does he think this was a proper policy? According to him, when was this policy first departed from, and with what results? Does he think we ought to return to it entirely? Is our recognition policy in Central America in accord with the traditional policy? Explain. Does the traditional policy dominate the attitude of the United States towards the recognition of Manchukuo (§ 26)? Does Mr. Stimson refer to the Soviet Government of Russia, which the United States had not recognized when he made his speech? How would you have applied the principles in the speech to the case of the Soviet Government? To the case of the Italian conquest and annexation of Ethiopia?

4. Describe the course of events portrayed in the correspondence in § 24. Does President Roosevelt use the words "recognize" or "recognition" in this correspondence? Does President Kalinin or Commissar Litvinoff use these words? In the words of the correspondents, what is the purpose of these communications? Does this purpose have anything to do with recognition? Explain. Does the fact that the President of the United States writes these communications have any significance? Explain.

Did the United States recognize Russia before this exchange? The Soviet Government?

Which of these communications, if any, constitutes recognition? Justify your answer. What is recognized, the State of Russia, or the Soviet Government?

From this correspondence and the speech of Secretary Stimson (§ 22), would you judge that questions of recognition were settled always separately and on their own merits, or that they were involved in the settlement of other questions? Did the United States obtain anything in return for recognition in the case of Soviet Russia?

5. From the materials in § 26, how would you state the "Stimson doctrine" of nonrecognition? In what circumstances did this doctrine arise? In the circumstances, is it solely a doctrine espoused by the United States? What is the attitude of Japan towards the doctrine?

What is the meaning of the statement in the Japanese Note of January 16, 1932, that "it might be the subject of an academic doubt, whether in a given case the impropriety of means necessarily and always avoids the ends secured, but as Japan has no intention of adopting improper means, that question does not practically arise?"

6. In view of its nonrecognition policy, how should the United States deal with the following situations (the Pact of Paris is printed below as § 113):

(a) Manchukuo forbids the entry of all American products within its jurisdiction. To whom should the United States protest?

(b) Manchukuo annexes Inner Mongolia by the use of military force, but without war being declared by any State.

(c) The United States seeks the extradition of a person who, having committed a murder in Illinois, has fled to the area under the *de facto* control of Manchukuo. To what government should the United States apply for extradition? Explain.

(d) Japan, China, Russia, and Manchukuo ratify a treaty defining the boundaries of Manchukuo as including the territory of Inner Mongolia.

7. State X is a Member of the League of Nations. If it acted in accord with the Recommendations of the Advisory Committee as reprinted in § 27, what should it do in the following circumstances:

(a) Manchukuo seeks to become a Member of the League of Nations.

(b) The Netherlands is approached by Manchukuo, which desires to adhere to the Opium Convention of 1912. What should be the attitude of the Netherlands? Of State X?

(c) A post office of State X receives a package bearing stamps only of Manchukuo.

(d) A bank in State X receives for deposit a quantity of Manchukuo currency.

(e) Manchukuo desires to have consuls resident in State X.

- (f) Persons desiring to enter State X have only Manchukuo passports.
- (g) Manchukuo bonds are offered for sale by a State X private bank.
- (h) The Emperor of Manchukuo visits State X.

8. Debate the following question: *Resolved*, That it is more advantageous to the United States to continue the policy of nonrecognition than to recognize Manchukuo.

9. In *R.S.F.S.R. v. Cibrario* (§ 28), what was the question before the Court of Appeals of New York? How did the Court answer this question? Did the Court regard the R.S.F.S.R.'s attempt to sue as a matter to be settled as of strict right, or of comity? What is meant by comity?

Did comity require that the R.S.F.S.R. be permitted to sue? Could there be comity requiring this unless the United States had recognized the R.S.F.S.R.? Could the Court recognize the R.S.F.S.R.? How did the Court find out whether the R.S.F.S.R. had been recognized? Do you think this is the correct procedure?

10. Prior to 1917 the United States maintained friendly relations with the Czar's Government in Russia. In March, 1917, there was a revolution, and a Provisional Government under Kerensky was established which was recognized by the United States. In November, 1917, the second revolution established the present Soviet Government in *de facto* control, but this Government was not recognized by the United States until 1933. During the interval the American State Department continued to recognize the representative of the Kerensky Government. In these circumstances, how should the following cases be settled? Why? All the actions are in New York Courts.

- (a) In 1913, Mr. A sues Russia.
- (b) In 1913, Russia sues Mr. B.
- (c) In September, 1917, Russia sues Mr. C.
- (d) In September, 1917, Mr. D. sues Russia.
- (e) In 1920, Russia (Provisional Government) sues Mr. E.
- (f) In 1930, Mr. F sues Russia (Provisional Government).
- (g) In 1930, Russia (Soviet Government) sues Mr. G.
- (h) In 1930, Mr. H sues Russia (Soviet Government).
- (i) In 1935, Russia (Soviet Government) sues Mr. I.
- (j) In 1935, Mr. J sues Russia (Soviet Government).

Would it have made any difference from (e) forward, if Russia (Soviet Government) had become a Member of the League of Nations in 1925? Explain.

11. What were the facts in *Luther v. Sagor* (§ 30)? Was the case tried in a British or a Russian court? Were the acts whose validity was in question the acts of a government recognized by Great Britain? Did the acts of the Russian Government take place within the jurisdiction of Great Britain, or within the jurisdiction of Russia? How could such acts become the subject of discussion in a British court?

In the lower court, what was the judgment? Did the question whether the Soviet Government had been recognized play any part in the decision? To what kind of evidence did the court resort to discover whether the Soviet Government had been recognized? Did this evidence show that that Government had been recognized? Do you agree with the court's interpretation of this evidence? For this particular case what were the consequences of the lower court's judgment on this point?

Did anything of consequence happen between this judgment and the hearing of the case in the Court of Appeal?

Consider the questions in paragraph 2 above, but in relation to the judgment of the Court of Appeal. Did the Court of Appeal reverse the judgment below? Did it *overrule* the judgment below? What is the difference? Would it be possible to say that both judgments were correct? Explain.

What light do the judgments throw on the difference between *de facto* and *de jure* recognition?

12. The Province of Graustark revolts from the Kingdom of Ruritania, the revolt beginning July 4, 1923, and *de facto* control of Graustark being established early in August, 1923. The Graustarkian Government is admitted to membership in the League of Nations in September, 1925. In 1930 the Secretary of State of the United States negotiates a treaty with a representative of the Graustarkian Government, but the treaty is defeated in the Senate on the ground that its ratification would involve the recognition of Graustark, which recognition had not hitherto been extended.

(a) Certain tractors are seized July 15, 1923, by the military forces of the Kingdom of Ruritania, in the course of operations in Graustark, and sold to an American concern. Upon the arrival of the tractors in the United States the original Graustarkian owners seek to regain possession in the courts.

(b) Trucks belonging to an American concern are seized on the same day by a Graustarkian general. In November, 1925, the American concern seeks to sue Graustark in the Federal courts.

(c) In 1933 the Government of Graustark seeks to file a suit in a Federal court against the Kingdom of Ruritania, relating to a division of Ruritanian state property in the United States.

(d) In 1926 the Graustarkian Government confiscates the property of a British concern in Graustark. The property subsequently coming within British jurisdiction after having been sold by Graustark to the X corporation, the original owners seek to recover in 1927.

13. Suppose that you are the Judge in a United States Court; that in cases involving the States indicated below inquiries have been made of the Department of State, which have elicited the quoted information. What would you decide, and why?

(a) State A seeks to sue Mr. X. Department of State says: "The President and Congress have recognized the insurrection being carried on by persons styling themselves 'State A' against the State of Berengaria."

(b) State B seeks to sue Mr. Y. Department of State says: "On January 4, 1935, the President received a Minister accredited by State B."

(c) State C seeks to sue Mr. Z. Department of State says: "Persons styling themselves 'State C' recently raised the standard of revolt against the State of Mauretania, and on March 6, 1936, the President issued a Proclamation of Neutrality."

(d) Question of the validity of acts of the *de facto* government of State D within State D's jurisdiction. Department of State says: "While no representative of State D has been received officially and no treaty has been signed with State D, the President has conferred informally with a commercial agent of State D."

(e) Army of State E, same case as (d) above. Department of State says: "President has recognized provisionally, and with all due reservations as to the

future, the Army of State E as exercising full *de facto* authority in province F of State G."

14. What were the circumstances which led to the preparation of the Opinion of Law Officers of the Crown, reprinted as § 32? What weight would the Opinion have as evidence before an international tribunal?

Did the Law Officers advise that a Proclamation of Neutrality be issued? When, in their opinion, would circumstances exist justifying the issuance of such a proclamation? When such a proclamation is issued, does the neutral State assume any obligations? Explain. What relation did the possibility that the Turkish Government had proclaimed a blockade have to this question? What relation did the report that the "Provisional Government" of Crete intended to issue letters of marque and reprisal have to the question? If a Proclamation of Neutrality were issued, would the British Government have to recognize rights in the Cretan rebels which it would not have to recognize if the Proclamation did not issue? Explain.

If no Proclamation was issued, what did British law provide with reference to the fitting out of cruisers in British jurisdiction which were intended to be used against Turkey by the Cretan rebels?

15. Explain clearly the difference between the recognition of *belligerency* and the admission of *insurgency*.

16. "There is an insurrection in State X. A party consisting of insurgents and nationals of State Y sail out in *The Rebellion*, a vessel flying the flag of State Y, with the purpose of aiding the insurgents. The vessel is actually owned by the insurgents and according to the law of State Y is not entitled to fly its flag. A naval force of State X seizes *The Rebellion* on the high seas and brings it into port. The court of State X orders the execution of all the persons on board as pirates and the condemnation of the vessel as piratical.

"State Y protests (a) against the seizure of *The Rebellion* on the high seas, (b) against its condemnation, and (c) against the execution of its citizens; and demands salute of its flag, restoration of the vessel, and pecuniary indemnity. Are State Y's demands justifiable and what defenses can State X make for its action according to the international law?"—Department of State, *Examination for the Foreign Service*, September, 1932.

V

Nationality

§ 34. NATURE OF NATIONALITY QUESTIONS

The following document is part of an Advisory Opinion of the Permanent Court of International Justice. It is to be noted that the Court gave this opinion upon a specific question of law, and that the opinion did not "settle," in the larger sense, the dispute between France and Great Britain. However, though the Council of the League of Nations asked the Court for its opinion, this request was made at the request of the disputant States; and these States, assisted by the opinion of the Court as to the legal character of their dispute, were able through negotiations to come to an amicable settlement.

Advisory Opinion, Tunis-Morocco Nationality Decrees

PERMANENT COURT OF INTERNATIONAL JUSTICE, 1923

Publications, Permanent Court of International Justice, Series B,
No. 4, pp. 22-32.

[The Council of the League of Nations requested an advisory opinion of the Permanent Court of International Justice as to "Whether the dispute between France and Great Britain as to the Nationality Decrees issued in Tunis and Morocco (French zone) on November 8, 1921, and their application to British subjects is or is not, by international law, solely a matter of domestic jurisdiction (article 15, paragraph 8, of the Covenant)." The decrees conferred French nationality on certain British subjects. Parts I-III of the Opinion are omitted.]

[By the Court]:

IV. Under the terms of sub-section (a) of the Council's resolution, the Court, in replying to the question stated above, has to give an opinion upon the nature and not upon the merits of the dispute, which, under the terms of sub-section (c) may, in certain circumstances, form the subject of a subsequent decision.

The Court therefore wishes to emphasize that no statement or argument

comprised in the present opinion can be interpreted as indicating a preference on the part of the Court in favour of any particular solution, as regards the whole or any individual point of the actual dispute.

The analysis of the diplomatic correspondence given under Part II above, and the fact that the Council's resolution in its sub-section (a) refers in parenthesis to paragraph 8 of Article 15 of the Covenant, lead to the conclusion that the question submitted to the Court must be read and answered in the light of the provisions of that paragraph.

The paragraph to which sub-section (a) of the Council's resolution expressly refers is as follows:

[English text.] "If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement." [French text omitted.]

Special attention must be called to the word "exclusive" in the French text, to which the word "solely" (within the domestic jurisdiction) corresponds in the English text. The question to be considered is not whether one of the parties to the dispute is or is not competent in law to take or to refrain from taking a particular action, but whether the jurisdiction claimed belongs solely to that party.

From one point of view, it might well be said that the jurisdiction of a State is exclusive within the limits fixed by international law—using this expression in its wider sense, that is to say, embracing both customary law and general as well as particular treaty law. But a careful scrutiny of paragraph 8 of Article 15 shows that it is not in this sense that exclusive jurisdiction is referred to in that paragraph.

The words "solely within the domestic jurisdiction" seem rather to contemplate certain matters which, though they may very closely concern the interests of more than one State, are not, in principle, regulated by international law. As regards such matters, each State is sole judge.

The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.

For the purpose of the present opinion, it is enough to observe that it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs

solely to the State, is limited by rules of international law. Article 15, paragraph 8, then ceases to apply as regards those States which are entitled to invoke such rules, and the dispute as to the question whether a State has or has not the right to take certain measures becomes in these circumstances a dispute of an international character and falls outside the scope of the exception contained in this paragraph. To hold that a State has not exclusive jurisdiction does not in any way prejudice the final decision as to whether that State has a right to adopt such measures.

This interpretation follows from the actual terms of paragraph 8 of Article 15 of the Covenant, and, in the opinion of the Court, it is also in harmony with that Article taken as a whole.

Article 15, in effect, establishes the fundamental principle that any dispute likely to lead to a rupture which is not submitted to arbitration in accordance with Article 13 shall be laid before the Council. The reservations generally made in arbitration treaties are not to be found in this Article.

Having regard to this very wide competence possessed by the League of Nations, the Covenant contains an express reservation protecting the independence of States; this reservation is to be found in paragraph 8 of Article 15. Without this reservation, the internal affairs of a country might, directly they appeared to affect the interests of another country, be brought before the Council and form the subject of recommendations by the League of Nations. Under the terms of paragraph 8, the League's interest in being able to make such recommendations as are deemed just and proper in the circumstances with a view to the maintenance of peace must, at a given point, give way to the equally essential interest of the individual State to maintain intact its independence in matters which international law recognises to be solely within its jurisdiction.

It must not, however, be forgotten that the provision contained in paragraph 8, in accordance with which the Council, in certain circumstances, is to confine itself to reporting that a question is, by international law, solely within the domestic jurisdiction of one Party, is an exception to the principles affirmed in the preceding paragraphs and does not therefore lend itself to an extensive interpretation.

This consideration assumes especial importance in the case of a matter, which, by international law, is, in principle, solely within the domestic jurisdiction of one Party, but in regard to which the other Party invokes international engagements which, in the opinion of that Party, are of a nature to preclude in the particular case such exclusive jurisdiction. A difference of opinion exists between France and Great Britain as to how far it is necessary to proceed with an examination of these international engagements in order to reply to the question put to the Court.

It is certain—and this has been recognised by the Council in the case of

the Aaland Islands—that the mere fact that a State brings a dispute before the League of Nations does not suffice to give this dispute an international character calculated to except it from the application of paragraph 8 of Article 15.

It is equally true that the mere fact that one of the parties appeals to engagements of an international character in order to contest the exclusive jurisdiction of the other is not enough to render paragraph 8 inapplicable. But when once it appears that the legal grounds (*titres*) relied on are such as to justify the provisional conclusion that they are of juridical importance for the dispute submitted to the Council, and that the question whether it is competent for one State to take certain measures is subordinated to the formation of an opinion with regard to the validity and construction of these legal grounds (*titres*), the provisions contained in paragraph 8 of Article 15 cease to apply and the matter, ceasing to be one solely within the domestic jurisdiction of the State, enters the domain governed by international law.

If, in order to reply to a question regarding exclusive jurisdiction, raised under paragraph 8, it were necessary to give an opinion upon the merits of the legal grounds (*titres*) invoked by the Parties in this respect, this would hardly be in conformity with the system established by the Covenant for the pacific settlement of international disputes.

For the foregoing reasons, the Court holds, contrary to the final conclusions of the French Government, that it is only called upon to consider the argument and legal grounds (*titres*) advanced by the interested Governments in so far as is necessary in order to form an opinion upon the nature of the dispute. While it is obvious that these legal grounds (*titres*) and arguments cannot extend either the terms of the request submitted to the Court by the Council or the competence conferred upon the Court by the Council's resolution, it is equally clear that the Court must consider them in order to form an opinion as to the nature of the dispute referred to in the said resolution—with regard to which the Court's opinion has been requested.

V. The main arguments developed by the Parties in support of their respective contentions are as follows:

1. A. The French Decrees relate to persons born, not upon the territory of France itself, but upon the territory of the French Protectorates of Tunis and of the French zone of Morocco. Granted that it is competent for a State to enact such legislation within its national territory, the question remains to be considered whether the same competence exists as regards protected territory.

The extent of the powers of a protecting State in the territory of a protected State depends, first, upon the Treaties between the protecting State and the protected States establishing the Protectorate, and, secondly, upon the conditions under which the Protectorate has been recognized by third Pow-

ers as against whom there is an intention to rely on the provisions of these Treaties. In spite of common features possessed by Protectorates under international law, they have individual legal characteristics resulting from the special conditions under which they were created, and the stage of their development. . . .

The question whether the exclusive jurisdiction possessed by a protecting State in regard to nationality questions in its own territory extends to the territory of the protected State depends upon an examination of the whole situation as it appears from the standpoint of international law. The question therefore is no longer solely one of domestic jurisdiction as defined above. (See Part IV.)

B. The French Government contends that the public powers (*puissance publique*) exercised by the protecting State, taken in conjunction with the local sovereignty of the protected State, constitute full sovereignty equivalent to that upon which international relations are based, and that therefore the protecting State and the protected State may, by virtue of an agreement between them, exercise and divide between them within the protected territory the whole extent of the powers which international law recognises as enjoyed by sovereign States within the limits of their national territory. This contention is disputed by the British Government.

The Court observes that, in any event, it will be necessary to have recourse to international law in order to decide what the value of an agreement of this kind may be as regards third States, and that the question consequently ceases to be one which, by international law, is solely within the domestic jurisdiction of a State, as that jurisdiction is defined above.

2. A. Great Britain denies that the Decrees of November 8th, 1921, are applicable to British subjects, and relies in support of her contention upon the Treaties concluded by her with the two States which were subsequently placed under protectorate (Treaty between Great Britain and Morocco dated December 9th, 1856, and Treaty between Great Britain and Tunis dated July 19th, 1875). By virtue of these Treaties, persons claimed as British subjects would enjoy a measure of extraterritoriality incompatible with the imposition of another nationality.

According to the French contention, as developed in the course of the oral statements, these Treaties, which were concluded for an indefinite period, that is to say, in perpetuity, have lapsed by virtue of the principle known as the *clausula rebus sic stantibus* because the establishment of a legal and judicial regime in conformity with French legislation has created a new situation which deprives the capitulatory regime of its *raison d'être*.

It is clearly not possible to make any pronouncement upon this point without recourse to the principles of international law concerning the duration of the validity of treaties. It follows, therefore, that in this respect also

the question does not, by international law, fall solely within the domestic jurisdiction of a State, as that jurisdiction is defined above.

B. As regards Tunis more especially, France contends that, following upon negotiations between the French and British Governments, Great Britain formally renounced her rights of jurisdiction in the Regency (Note from Lord Granville to M. Tissot dated June 20th, 1883, British Case, Appendix No. 6; French Counter-Case page 82; Order in Council of December 31st, 1883), and that by the Franco-British Arrangement of September 18th, 1897, she accepted a new basis for the relations between France and herself in Tunis. It appears from the Cases and Counter-Cases that the two Governments take different views with regard to the scope of the declarations made by Great Britain in this respect and also with regard to the construction to be placed upon the Arrangement of 1897.

The appreciation of these divergent points of view involves, owing to the very nature of the divergence, the interpretation of international engagements. The question therefore does not, according to international law, fall solely within the domestic jurisdiction of a single State, as that jurisdiction is defined above.

C. As far as Morocco is concerned, it is certain that Great Britain still exercises there her consular jurisdiction. France argues that Great Britain, by consenting to the Franco-German Convention of November 4th, 1911, with regard to Morocco, agreed to renounce her capitulatory rights as soon as the new judicial system contemplated by the Convention had been introduced.

The British Government, on the contrary, contends that the Franco-German Convention of 1911—its adhesion to which was conditional upon the internationalisation of the town and district of Tangiers, a condition which has not yet been fulfilled—was not an agreement for the suppression of the capitulatory regime: in this respect, the relations between France and Great Britain are, it is said, still governed by the second of the Secret Articles of the Anglo-French Declaration of April 8th, 1904 (British Counter-Case, Appendix No. 7).

In the case of Morocco also, therefore, as in the case of Tunis, there is a difference with regard to the interpretation of international engagements. The international character of the legal situation follows not only from the fact that the two Governments concerned place a different construction upon the obligations undertaken, but also from the fact that Great Britain exercises capitulatory rights in the territory of the French Protectorate in Morocco. Again, from this standpoint, the question does not, according to international law, fall solely within the domestic jurisdiction of a State, as that jurisdiction is defined above.

3. Apart from all considerations which relate to the protectorate and to the capitulations in Tunis, Great Britain relies, as regards that country, upon the most-favoured-nation clause (Anglo-French Arrangement of September 18th, 1897, and the Notes of March 8th and May 23rd, 1919, exchanged between the French and British Governments on the subject of that Arrangement; see British Case Appendix 9, and French Counter-Case, page 64), in order to assert a claim to benefit by Article 13 of the Franco-Italian Consular Convention of September 28th, 1896. This Article expressly contemplates the preservation of their nationality by Italian subjects in Tunis. France, however, denies that the most-favoured-nation clause relied upon by Great Britain is applicable in the present case, because of the exclusively economic bearing of that clause and because of the synallagmatic character of the Franco-Italian Convention.

It follows that the question is one which, by international law, does not fall solely within the domestic jurisdiction of a single State as defined above.

4. According to the French Government, paragraph 2 of Article 1 of the Arrangement of September 18th, 1897, should be interpreted as a formal recognition by Great Britain of the competence of France to legislate with regard to the situation of persons in Tunis, and more particularly with regard to their nationality, under the same conditions as in France. This construction is disputed by the British Government.

Since, even assuming the French contention to be correct, the question whether France possesses such competence in this respect would still depend, as regards Great Britain, on the construction to be placed upon the most-favoured-nation clause mentioned under No. 3, this question is not, according to international law, solely a matter of domestic jurisdiction as defined above.

The Court, not having to enter into the merits of the dispute, confines itself to consideration of the facts set down under Nos. 1, 2, 3 and 4.

In the opinion of the Court, these facts suffice, even when considered separately, to prove that the dispute arises out of a matter which, by international law, is not solely within the domestic jurisdiction of France as such jurisdiction is defined in this opinion.

FOR THESE REASONS:

THE COURT IS OF OPINION *that the dispute referred to in the Resolution of the Council of the League of Nations of October 4th, 1922, is not, by international law, solely a matter of domestic jurisdiction (Article 15, paragraph 8, of the Covenant), and therefore replies to the question submitted to it in the NEGATIVE. . . .*

§ 35. NATIONALITY, JUS SOLI, JUS SANGUINIS

NOTE BY THE EDITOR

The World Court stated a principle of international law when it said that questions of nationality were, in principle, within the "reserved domain" of questions "solely within the domestic jurisdiction," but that the right of a State to use its discretion in this field might nevertheless be restricted by obligations undertaken towards other States. Both the principle and the limitation are reflected in the *Convention on Certain Questions Relating to the Conflict of Nationality Laws* (in force as between ten ratifying States in 1937):

ARTICLE 1. It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality. ARTICLE 2. Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.

The words "nationality" and "national" are not defined in this Convention. The Harvard Law School Research in International Law, for purposes of its Draft Convention on The Law of Nationality, defined "nationality" as "the status of a natural person who is attached to a state by the tie of allegiance," and a "national" of a state as a "natural person attached to that state by the tie of allegiance." In explanation, the Comment declares:

Nationality has no positive, immutable meaning. . . . Nationality always connotes, however, membership of some kind in the society of a state or nation. . . . The term "nationality" has reference to the position of a natural person from the point of view of international law. Every person permanently attached to a state has its nationality, whatever may be his particular rights and duties with regard to the state. These are dependent upon the constitution and laws of the state. Nationality does not necessarily involve the right or privilege of exercising civil or political functions. . . . Thus nationality has a broader meaning than "citizenship," for which it is frequently used as a synonym. . . . While the term "national" as a synonym for "subject" or "citizen" in the broad sense is of comparatively recent origin, it has come into very general use. It indicates attachment to a State without emphasizing unduly the power of the State on the one hand or the civic rights of the individual on the other. Its use has become common in the United States since the acquisition of the Philippine Islands and other insular possessions having inhabitants who, though they have American nationality and are entitled to full protection abroad by the Government of the

United States, have not the status of "citizens of the United States" within the meaning of Article 14 of the Amendments to the Constitution.¹

The fact that each State's law determines what persons possess its nationality results in cases in which the same individual may legally have two or more nationalities, or no nationality at all. Instances are given in §§ 37-41 below. Such cases are recognized and dealt with both by national and international tribunals, and it is largely the difficulties arising from them, particularly in connection with military service and with the nationality of married women, which have led to attempts by States in recent years to use the treaty device to approach the establishment of the principle, "one person, one nationality."

Persons acquire the legal status of nationality either at birth or subsequently through naturalization. Naturalization is ordinarily individual and voluntary (see p. 157, below), but it may be both collective and involuntary, as when treaties ceding territory provide that the inhabitants become nationals of the acquiring State (see §§ 16, 72).

There are two principles only by reason of which States confer their nationality upon individuals at birth: (1) the birth of the person within its territory or a place assimilated thereto (*jus soli*); and (2) the descent of the person from one of its nationals (*jus sanguinis*). Laws of particular States conferring nationality at birth are always expressions of one or the other of these principles, though details vary. From these principles alone, without any consideration of naturalization, it is evident how cases of dual nationality or of statelessness may arise. For example: a child is born to parents having the nationality of a State which confers nationality on the basis of *jus sanguinis*, but in the territory of a State which confers nationality on the basis of *jus soli*. The child will have both nationalities at birth. Or a child is born within the territory of a State which applies only the *jus sanguinis*, to parents who are nationals of a State which applies only the *jus soli*. The child will have no nationality at birth. Flournoy and Hudson in 1929 listed seventeen States (including Japan, Germany, and Russia) whose laws were based solely on *jus sanguinis*, two States whose laws were based both on *jus soli* and *jus sanguinis*, twenty-five States (including France, Italy, and Mexico) whose laws were based principally on *jus sanguinis*, but also contain provisions based on *jus soli*, and twenty-seven States (including the United States and Great Britain) whose laws are based principally on *jus soli*, but also contain provisions based on *jus sanguinis*. They list no States whose laws are based only on *jus soli*.²

Laws dealing with naturalization, "the process by which a state confers

¹ Harvard Law School, Research in International Law, "The Law of Nationality," in 23 *A.J.I.L. (Spec. Supp., 1929)*, 21-25.

² *Ibid.*, pp. 80-82. For texts of laws and treaties, see Flournoy and Hudson, *Nationality Laws* (1930).

its nationality upon a natural person after birth," (Harvard Draft, Art. 1), also create situations of dual nationality and no nationality. The situation with respect to the effect of marriage upon the nationality of women (see § 41 below) is one conspicuous example.

The principle of *jus soli* has had constitutional recognition in the United States since 1865, when the principle that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," was embodied in the Fourteenth Amendment. In the case of *United States v. Wong Kim Ark* (1898), 169 U.S. 649, this principle was applied to confer American citizenship on a person born in the United States, the son of Chinese parents ineligible for naturalization under existing United States legislation. The Supreme Court regarded the Fourteenth Amendment as declaratory of rights existing prior to its enactment as regards persons born in the United States and subject to its jurisdiction, but as not affecting the status of persons born outside United States jurisdiction to American parents, a matter which Congress had regulated by legislation. "The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes."

Congress has, however, utilized the principle of *jus sanguinis* (in the exercise of its constitutional power "to establish a uniform rule of naturalization") to confer United States citizenship on children born in foreign countries of American fathers. See below, page 156. This statute led to extreme consequences in certain instances, and in 1934 Congress modified the statute so as to give effect to a Supreme Court decision in *Weedin v. Chin Bow* (1927) 274 U.S. 657, that the principle of the statute did not extend to a child of a father who had not resided in the United States prior to the birth of the child; and to extend the principle of *jus sanguinis* to the children born abroad of mothers who at the time of the birth of the child were citizens of the United States and who had previously resided in the United States. In such cases the child's acquisition of United States citizenship depended upon a continuous residence in the United States before it attained eighteen years of age, and upon its taking the oath of allegiance to the United States within six months after reaching its twenty-first birthday.

See, generally, D. V. Sandifer, "A Comparative Study of Laws relating to Nationality at Birth and to Loss of Nationality," 29 *A.J.I.L.* (1935), 248.

§ 36. SELECTIONS FROM THE NATIONALITY STATUTES OF THE UNITED STATES

The selections below do not aim to give a complete view of the statutes, but merely to illustrate important points.

Arranged and adapted from various sources, acknowledgment being made especially to Flournoy and Hudson, *A Collection of Nationality Laws* (Washington, D. C., Carnegie Endowment for International Peace, 1930), pp. 573-616.

a. Children Born Outside the United States to American Parents

Act of February 10, 1855, as re-enacted in *Revised Statutes*, § 1993; [8 USC § 6]. "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Act of March 2, 1907, 34 *Stat.* 1228; [8 USC § 6].

"SECTION 6. That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States, and who continue to reside outside the United States shall, in order to receive the protection of the Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority."

Act of May 24, 1934, 48 *Stat.* 797; [8 USC § 6], amends Section 1993 of the Revised Statutes (above) to read as follows:

"Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within

six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America . . ."

b. Naturalization

Act of February 18, 1875, 18 *Stat.* 318; as re-enacted in *Revised Statutes* § 2169; [8 *USC* § 359].

"SECTION 1. The provisions of this title [provisions for naturalization] shall apply to aliens being free white persons; and to aliens of African nativity and to persons of African descent."

Act of June 29, 1906, 34 *Stat.* 596.

"SECTION 4. [8 *USC* § 372.] That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

"First: He shall declare on oath before the clerk of any court authorized by this Act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States and to reside permanently therein, and that he will, before being admitted to citizenship, renounce forever all allegiance and fidelity to any foreign prince, potentate, State, or sovereignty, and particularly, by name, to the prince, potentate, State, or sovereignty of which the alien may be at the time of admission a citizen or subject. Such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien. No declaration of intention or petition for naturalization shall be made outside of the office of the clerk of court. [As amended by the Act of March 4, 1929, 45 *Stat.* 1545; 8 *USC* § 373.]

"Second: Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number, if possible), his occupation, and, if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he shall

state the name of his wife and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date, and place of birth and place of residence of each child living at the time of the filing of his petition: *Provided*, That if he has filed his declaration before the passage of this Act [June 29, 1906,] he shall not be required to sign the petition in his own handwriting.

"The petition shall set forth that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government, a polygamist or believer in the practice of polygamy, and that it is his intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of which he at the time of filing of his petition may be a citizen or subject, and that it is his intention to reside permanently within the United States, and whether or not he has been denied admission as a citizen of the United States, and, if denied, the ground or grounds of such denial, the court or courts in which such decision was rendered, and that the cause for such denial has since been cured or removed, and every fact material to his naturalization and required to be proved upon the final hearing of his application. [8 USC § 379.]

"As to each period of residence at any place in the county where the petitioner resides at the time of filing his petition, there shall be included in the petition the affidavits of at least two credible witnesses, citizens of the United States, stating that each has personally known the petitioner to have been a resident at such place for such period, and that the petitioner is and during all such period has been a person of good moral character. [As amended by the Act of March 2, 1929, 45 Stat. 1513; 8 USC § 379.]

"At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Labor, if the petitioner arrived in the United States after the passage of this Act, [June 29, 1906,] stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner which certificate and declaration shall be attached to and made a part of said petition. [8 USC § 380.]

"Third: He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same. [8 USC § 381.]

"Fourth: No alien shall be admitted to citizenship unless (1) immediately preceding the date of his petition the alien has resided continuously within the United States for at least five years and within the county where the petitioner resided at the time of filing his petition for at least six months, (2) he has resided continuously within the United States from the date of his petition up to the time of his admission to citizenship, and (3) during all the periods referred to in this subdivision he has behaved as a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States. At the hearing of the petition, residence in the county where the petitioner resides at the time of filing his petition, and the other qualifications required by this subdivision during such residence, shall be proved by the oral testimony of at least two credible witnesses, citizens of the United States, in addition to the affidavits required by this Act to be included in the petition. If the petitioner has resided in two or more places in such county and for this reason two witnesses cannot be procured to testify as to all such residence, it may be proved by the oral testimony of two such witnesses for each such place of residence, in addition to the affidavits required by this Act to be included in the petition. At the hearing, residence within the United States but outside the county, and the other qualifications required by this subdivision during such residence shall be proved either by depositions made before a naturalization examiner or by the oral testimony of at least two such witnesses for each place of residence.

"If an individual returns to the country of his allegiance and remains therein for a continuous period of more than six months and less than one year during the period immediately preceding the date of filing the petition for citizenship for which continuous residence is required as a condition precedent to admission to citizenship, the continuity of such residence shall be presumed to be broken, but such presumption may be overcome by the presentation of satisfactory evidence that such individual had a reasonable cause for not returning to the United States prior to the expiration of such six months. Absence from the United States for a continuous period of one year or more during the period immediately preceding the date of filing the petition for citizenship for which continuous residence is required as a condition precedent to admission to citizenship shall break the continuity of such residence. [As amended by the Act of March 2, 1929, 45 Stat. 1513; 8 USC § 382.]

"Fifth: In case the alien applying to be admitted to citizenship has borne any hereditary title, or has been of any of the orders of nobility in the kingdom or state from which he came, he shall in addition to the above

requisites, make an express renunciation of his title or order of nobility in the court to which his application is made, and his renunciation shall be recorded in the court." [Act of June 29, 1906, 34 *Stat.* 596; 8 *USC* § 386.]

c. Derivative Naturalization of Minor Children

Act of March 2, 1907, 34 *Stat.* 1228; 8 *USC* § 8.

"SECTION 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: *Provided*, That such naturalization or resumption takes place during the minority of such child: *And provided further*, That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States."

Act of May 24, 1934, 48 *Stat.* 797; 8 *USC* § 8.

Section 5 of the Act of March 2, 1907 (above), is amended to read as follows: "SECTION 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the father or the mother: *Provided*, That such naturalization or resumption shall take place during the minority of such child: *And provided further*, That the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States."

d. Citizenship and Naturalization of Married Women

Act of February 10, 1855, as re-enacted in *Revised Statutes*, § 1994.

"Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen." [Repealed by § 6 of the Act of September 22, 1922.]

[From this point the sections of the Cable Act (Act of September 22, 1922) will be printed separately and will be followed by changes made in subsequent legislation.—Ed.]

Act of September 22, 1922, 42 *Stat.* 1021; 8 *USC* §§ 367, 368.

"SECTION 1. The right of any woman to become a naturalized citizen of the United States shall not be denied or abridged because of her sex or because she is a married woman."

"SECTION 2. That any woman who marries a citizen of the United States after the passage of this Act, or any woman whose husband is naturalized

after the passage of this Act, shall not become a citizen of the United States by reason of such marriage or naturalization; but, if eligible to citizenship, she may be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions:

“(a) No declaration of intention shall be required.

“(b) In lieu of the five-year period of residence within the United States and the one-year period of residence within the State or Territory where the naturalization court is held, she shall have resided continuously in the United States, Hawaii, Alaska, or Porto Rico for at least one year immediately preceding the filing of the petition.”

Act of May 24, 1934, 48 *Stat.* 797; 8 *USC* § 368.

[Section 4 amends Section 2 of the Act of 1922 (immediately above) to read:]

“SECTION 2. That an alien who marries a citizen of the United States after the passage of this Act, as here amended, or an alien whose husband or wife is naturalized after the passage of this Act, as here amended, shall not become a citizen of the United States by reason of such marriage or naturalization; but, if eligible to citizenship, he or she may be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions:

“(a) No declaration of intention shall be required.

“(b) In lieu of the five-year period of residence within the United States and the one-year period of residence within the State or Territory where the naturalization court is held, he or she shall have resided continuously in the United States, Hawaii, Alaska, or Porto Rico for at least three years immediately preceding the filing of the petition.”

Act of September 22, 1922, 42 *Stat.* 1022; 8 *USC* § 9.

“SECTION 3. That a woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after the passage of this Act, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens: *Provided*, That any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States. If at the termination of the marital status she is a citizen of the United States she shall retain her citizenship regardless of her residence. If during the continuance of the marital status she resides continuously for two years in a foreign State of which her husband is a citizen or subject, or for five years continuously outside the United States, she shall thereafter be subject to the same presumption as is a naturalized citizen of the United States under the second

paragraph of Section 2 of the Act entitled 'An Act in reference to the expatriation of citizens and their protection abroad,' approved March 2, 1907. Nothing herein shall be construed to repeal or amend the provisions of Revised Statutes 1909 or of section 2 of the Expatriation Act of 1907 with reference to expatriation."

Act of July 3, 1930, 46 *Stat.* 854; 8 *USC* § 9.

[Repeals the last three sentences of Section 3 of the Act of 1922 (immediately above), "but such repeal shall not restore citizenship lost under such section 3 before such repeal."]

Act of March 3, 1931, 46 *Stat.* 1511; 8 *USC* § 369a.

(a) of Section 4 amends Section 3 of the Act of September 22, 1922, to read:

"SECTION 3. (a) A woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after this section, as amended, takes effect, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens.

"(b) Any woman who before this section, as amended, takes effect, has lost her United States citizenship by residence abroad after marriage to an alien or by marriage to an alien ineligible to citizenship may, if she has not acquired any other nationality by affirmative act, be naturalized in the manner prescribed in section 4 of this Act, as amended. Any woman who was a citizen of the United States at birth shall not be denied naturalization under section 4 on account of her race.

"(c) No woman shall be entitled to naturalization under section 4 of this Act, as amended, if her United States citizenship originated solely by reason of her marriage to a citizen of the United States or by reason of the acquisition of United States citizenship by her husband."

(b) of Section 4 repeals Section 5 of the Act of September 22, 1922, which provided that "no woman whose husband is not eligible to citizenship shall be naturalized during the continuance of the marital status."

Act of May 24, 1934, 48 *Stat.* 797; 8 *USC* § 17a.

"SECTION 3. A citizen of the United States may upon marriage to a foreigner make a formal renunciation of his or her United States citizenship before a court having jurisdiction over naturalization of aliens, but no citizen may make such renunciation in time of war, and if war shall be declared within one year after such renunciation then such renunciation shall be void."

Act of September 22, 1922, 42 *Stat.* 1022; 8 *USC* § 369.

"SECTION 4. That a woman who, before the passage of this Act, has lost her United States citizenship by reason of her marriage to an alien eligible for citizenship, may be naturalized as provided by section 2 of this Act: *Provided*, That no certificate of arrival shall be required to be filed with her petition if during the continuance of the marital status she shall have resided within the United States. After her naturalization she shall have the same citizenship status as if her marriage had taken place after the passage of this Act."

"SECTION 5. That no woman whose husband is not eligible to citizenship shall be naturalized during the continuance of the marital status."

Act of July 3, 1930, 46 *Stat.* 854; 8 *USC* § 369.

[Section 2 provides that Section 4 of the Act of September 22, 1922, is amended to read as follows:]

"Section 4. (a) A woman who has lost her United States citizenship by reason of her marriage to an alien eligible to citizenship or by reason of the loss of United States citizenship by her husband may, if eligible to citizenship and if she has not acquired any other nationality by affirmative act, be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions:

(1) No declaration of intention and no certificate of arrival shall be required, and no period of residence within the United States or within the county where the petition is filed shall be required;

(2) The petition need not set forth that it is the intention of the petitioner to reside permanently within the United States;

(3) The petition may be filed in any court having naturalization jurisdiction, regardless of the residence of the petitioner;

(4) If there is attached to the petition, at the time of filing, a certificate from a naturalization examiner stating that the petitioner has appeared before him for examination, the petition may be heard at any time after filing.

"(b) After her naturalization such woman shall have the same citizenship status as if her marriage, or the loss of citizenship by her husband, as the case may be, had taken place after this section, as amended, takes effect."

"(b) of Section 2. The amendment made by this section to section 4 of such Act of September 22, 1922, shall not terminate citizenship acquired under such section 4 before such amendment."

Act of June 25, 1936, 49 *Stat.* 1917; 8 *USC* § 9a.

"That hereafter a woman, being a native-born citizen, who has or is believed to have lost her United States citizenship solely by reason of her marriage prior to September 22, 1922, to an alien, and whose marital status with such alien has or shall have terminated, shall be deemed to be a citizen to the same extent as though her marriage to such alien had taken place on or after September 22, 1922; *Provided, however,* That no such woman shall have or claim any rights until she shall have duly taken the oath of allegiance as prescribed in section 4 of the Act approved June 29, 1906 (34 Stat. 596; U.S.C., title 8, sec. 381), at any place within or under the jurisdiction of the United States before a court exercising naturalization jurisdiction thereunder, or, outside of the jurisdiction of the United States, before a secretary of embassy or legation or a consular officer as prescribed in section 1750 of the Revised Statutes of the United States . . ."

e. Loss of Nationality (Expatriation)

Act of July 27, 1868, as re-enacted in *Revised Statutes* (1878); 8 USC § § 13, 14, 15.

"SECTION 1999. Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed; Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic." [8 USC § 15.]

"SECTION 2000. All naturalized citizens of the United States, while in foreign countries, are entitled to and shall receive from this Government the same protection of persons and property which is accorded to native-born citizens." [8 USC § 13.]

"SECTION 2001. Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the

release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress." [8 USC § 14.]

Act of March 2, 1907, 34 Stat. 1228; 8 USC § § 16, 17.

"SECTION 2. That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign State in conformity with its laws, or when he has taken an oath of allegiance to any foreign State.

"When any naturalized citizen shall have resided for two years in the foreign State from which he came, or for five years in any other foreign State, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war."

§ 36f. LOSS OF NATIONALITY: EXPATRIATION

NOTE BY THE EDITOR

Although the United States has long insisted on the right of the individual to dissolve the ties of his former allegiance without the specific consent of the State of which he was formerly a national (§ 35e), the Harvard Law School Research in International Law found that "at present it cannot be said that there is any agreement upon the 'right of expatriation' . . .," though there was some tendency in recent legislation to recognize it.

It appears that the fact of naturalization in the foreign State causes loss of the prior nationality, without conditions, under the laws of the following States: Australia, Austria, Belgium, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Denmark, Ecuador, Germany, Great Britain, Guatemala, Haiti, Honduras, Iceland, Italy, Japan, Liberia, Mexico, Monaco, Netherlands, Newfoundland, New Zealand, Palestine, Panama, Peru, Portugal, Roumania, Salvador, Spain, United States of America, Uruguay, Venezuela. Under the laws of the following States naturalization in a foreign State does not cause the loss of the prior nationality unless the express consent of the State of prior nationality has been obtained or unless certain military services, required under the laws thereof, have been performed: Afghanistan, Albania, Bulgaria, China, Danzig,

Egypt, Esthonia, Finland, France, Greece, Hungary, Iraq, Latvia, Norway, Persia, Poland, Russia, Kingdom of the Serbs, Croats, and Slovenes, Siam, Sweden, Switzerland, Syria, Turkey. Under the laws of the following States, an alien may not be naturalized unless he has obtained the consent of the State of which he is a national: Austria, Belgian-Congo, Danzig, Ecuador, Japan, Monaco, Norway, Persia, Portugal, Roumania, Spain, Sweden.¹

The *Convention on Certain Questions Relating to the Conflict of Nationality Laws*, which treats this problem in its Articles 6 and 7, did not come to a clear-cut solution on the right of expatriation. (See § 42 below.) For this reason the United States did not sign or ratify it. The American delegates thought it inconsistent with American policy to recognize that the assent of a State of which an individual was previously a national was required to make his naturalization by another State effective, or that "expatriation permits" could be required.²

§ 37. "STATELESSNESS" OR NO NATIONALITY

Stoeck v. Public Trustee

GREAT BRITAIN, CHANCERY DIVISION

L.R. [1921] 2 Ch. 67.

RUSSELL J. The plaintiff sues the Public Trustee and the Attorney-General for a declaration that he was not on January 10, 1920 (the date when the Treaty of Peace with Germany came into force), and is not, a German national within the meaning of the Treaty of Peace Order, 1919, or the Treaty of Peace; and he also asks for other relief. The object of his action is to ascertain whether certain property in this country—namely, (i.) a sum of 2722 £. 11s. 6d; (ii.) a balance at the bank of 172 £. 9s. 4d.; and (iii.) some furniture in store—are subject to the charge created by s. 1, sub-s. XVI., of the Treaty of Peace Order, and whether he can deal with such property without incurring the pains and penalties prescribed by sub-s. XVII. of the same section. The Treaty of Peace Order provides that ss. III., IV., V., VI. and VII. of Part X. of the Treaty of Peace shall have full force and effect as law. By virtue of the Treaty of Peace Act, 1919, the Treaty of Peace Order has effect as if enacted in that Act. . . .

¹ "The Law of Nationality," 23 *A.J.I.L.* (*Spec. Supp.*, April, 1929), 45-46. Texts of laws may be found in Flournoy and Hudson, *Nationality Laws* (1929).

² See Flournoy, "Nationality Convention, Protocols and Recommendations adopted by the First Conference on the Codification of International Law," 24 *A.J.I.L.* (1930), 467.

See generally on expatriation: J. B. Moore, *Principles of American Diplomacy*, Chap. VII; L. Gettys, *Law of Citizenship in the United States* (1934), Chap. VII; E. M. Borchard, "Decadence of the American Doctrine of Voluntary Expatriation," 25 *A.J.I.L.* (1931), 312; R. W. Flournoy, "Naturalization and Expatriation," 31 *Yale Law Journal*, 702, 848.

The relevant personal history of the plaintiff is as follows: He was born in 1872 at Kreuznach in Rhenish Prussia. In October, 1895, he left Prussia and went to reside in Belgium. On June 26, 1896, he obtained his discharge from Prussian nationality. He never subsequently applied for, or obtained, the nationality of any German state. In November, 1896, he came to England, and made this country his permanent home. He was never naturalized here. In May, 1916, he was interned. In 1918 he was deported to Holland; thence he went to Germany and has resided there ever since. He was the owner of 3600 shares in a limited company, and in regard to those shares the Board of Trade proposed in 1916 to make a vesting order. He objected on the ground that he was not an enemy subject within the Trading with the Enemy Amendment Act, 1916. The matter was compromised by an agreement under which the shares were to be transferred to the Public Trustee as trustee for him; they were to be sold and the proceeds paid to his banking account in London. They were sold, but before the proceeds (2722 £. 11s. 6d.) had been paid to the bank he had been sent to Holland and had gone to live in Germany. He thereby became an enemy within the Trading with the Enemy Amendment Act, 1916, and accordingly an order was made, and properly made, under that Act by the Board of Trade vesting the proceeds of sale in the Public Trustee as custodian. So far as this sum of 2722 £. 11s. 6d. is concerned this action must fail, because (as was conceded at the trial) that sum is now held by the custodian subject, and subject only, to the provisions of s. 5, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914. There remain, however, the bank balance and the furniture which are the plaintiff's property, subject or not (as the case may be) to the charge created by the Treaty of Peace Order. . . .

The relevant question affecting the plaintiff is this: Is his property here property belonging to a German national and, therefore, property which is charged by the Treaty of Peace Order, and which he may not deal with except with the consent of the custodian or at the risk of fine and imprisonment? In other words, was the plaintiff on January 10, 1920, a German national?

The plaintiff alleges and contends, first, that he has ever since 1896 been completely divested of Prussian nationality and German nationality; secondly, that he has never acquired any other nationality; thirdly, that he is in the condition of a stateless person; fourthly, that he was not on January 10, 1920, a German national; and, fifthly, that his property here is, therefore, not subject to the charge created by the Treaty of Peace Order. The defendant alleges and contends, first, that notwithstanding the plaintiff's discharge in 1896, he either retained some remnant or shred of Prussian or German nationality, or had not lost such nationality for all purposes;

secondly, that the condition of a stateless person is one not recognized by law, international or municipal; thirdly, that the words "German national" in the Treaty of Peace, and incorporated therefrom into the Treaty of Peace Order, mean or include a German national according to English law; fourthly, that, English law not recognizing the condition of a stateless person, the plaintiff would be a German national according to English law; fifthly, that he was such a German national on January 10, 1920; and sixthly, that his property here is, therefore, subject to the charge created by the Treaty of Peace Order. . . . [The Court's discussion of *Ex parte Weber* [1916] 1 K. B. 280 n.; [1916] 1 A. C., 421, and *Ex parte Liebman* [1916] 1 K. B. 268, is omitted.]

The question for me to decide in this connection is whether the plaintiff on the evidence before me has satisfied me that he has lost his German nationality for all purposes. Two German lawyers were called before me, Dr. Goldschmidt and Dr. Baerwald; and I will now read their evidence upon this point. No evidence was called by the defendants. Dr. Goldschmidt said, "I am familiar with German law. I have seen a copy of the plaintiff's discharge of June 26, 1896. By this document Stoeck has absolutely lost his German nationality. He is discharged from his Prussian nationality and thereby he loses his imperial nationality. According to German law, having lost his German nationality and not having acquired any other, he would be regarded as stateless. On the handing out of the document of discharge Stoeck lost his German nationality for all purposes. He would then owe no duty or obligation to the German government or the German nation. I now produce the text of the Military Law of 1913. Sect. 1 (which amends the old s. 11) provides that persons who belong to no state but reside in Germany or in a protectorate may be called on for military service in the same way as Germans. I know of no right which persons formerly of German nationality possess; I know of no privilege which they possess except those conferred by ss. 13 and 33 of the Act of 1913. Those privileges apply both to former Germans who have acquired a fresh nationality and to those who have not. They apply also to descendants of a former German. The German word is 'abstammen,' that is, a descendant; child is 'kind.' There is no foundation in German law for the suggestion that a former German retains any German nationality or retains it for any purpose. Stoeck is not a German national for any purpose according to German law"; and that evidence is corroborated by Dr. Baerwald.

This evidence satisfies me that the plaintiff has lost his German nationality for all purposes. It is not suggested that he has acquired any other nationality. If then such a condition is possible in law the plaintiff is a person of no nationality; he is a stateless person. Is such a condition possible in law? So far as international law is concerned, opinions appear to

differ. Hall in his treatise on International Law, 7th ed., p. 256, deals with the matter as follows: "§ 74. In a certain number of cases it is possible for persons to be destitute of any national character. In Austria, for example, anyone emigrating without permission of the state loses his nationality by the act of emigrating, and is consequently without nationality until or unless he is formally received into another state community; in the Argentine Confederation, a foreign woman does not acquire the nationality of her husband on marrying an Argentine citizen, although she may have lost her nationality of origin by marrying a subject of another state; and the illegitimate son of an Englishwoman born in Russia, though British in the eye of Russian law, is of no nationality elsewhere, since by English law he is not British, and by Russian law he is not Russian. It is evident that the existence of numerous persons in like condition would be embarrassing; and it appears that much inconvenience was in fact caused until lately both in Germany and Switzerland by the presence of individuals who either had no nationality, or whose nationality it was impossible to determine. It was ultimately settled by convention as between the Swiss Cantons and as between German States that anyone found to be in either of these positions should be considered to be a subject of the state in which he was living." Oppenheim in his International Law, 2nd ed., vol. i., pp. 387-9, devotes a portion of Ch. 3 in Pt. 2 to the subject of "Double and Absent Nationality." He says: "§ 311. An individual may be destitute of nationality knowingly or unknowingly, intentionally or through no fault of his own. Even by birth a person may be stateless. Thus, an illegitimate child born in Germany of an English mother is actually destitute of nationality because according to German law he does not acquire German nationality, and according to British law he does not acquire British nationality. Thus, further, all children born in Germany of parents who are destitute of nationality are themselves, according to German law, stateless. But statelessness may take place after birth. All individuals who have lost their original nationality without having acquired another are in fact destitute of nationality." And, again, he states: "§ 313. Double as well as absent nationality of individuals has from time to time created many difficulties for the States concerned. As regards the remedy for such difficulties, it is comparatively easy to meet those created by absent nationality. If the number of stateless individuals increases much within a certain State, the latter can require them to apply for naturalisation or to leave the country; it can even naturalise them by Municipal Law against their will, as no other State will, or has a right to, interfere, and as, further, the very fact of the existence of individuals destitute of nationality is a blemish in Municipal as well as in International Law." Holtzendorff on the other hand takes a different view. After all the question of what state a person belongs to must ultimately be decided by the

municipal law of the state to which he claims to belong or to which it is alleged that he belongs; and, if no state exists according to the municipal law of which a given individual is its national, it is difficult to see to what state he can belong, how he can be other than a stateless person, or why an international lawyer or any one else should close his eyes to such a possibility.

How does the matter stand as regards German municipal law? It is clear on the evidence before me that German municipal law recognizes the condition of a stateless person. Sect. 1 of the Military Law of 1913 (in substituting a new s. 11 under the old law) specifically imposes the burden of military service on stateless persons who reside in Germany or a protectorate. A treaty between Germany and Denmark was referred to where the expression "staatenlos" appears. In Germany stateless persons must give security for costs in litigation because no country signed on their behalf a certain Hague Convention of 1896. The position of a stateless person is recognized in art. 29 of the German Introductory Statute, 1896. Finally the plaintiff produced an official paper of identity relating to himself and issued by the German police, in which he is described as "staatenlos" or "stateless."

How does the matter stand in regard to English municipal law? No authority dealing with the matter was produced to me, beyond the following passage in the judgment of Phillimore L. J. in *Ex parte Weber* [1916] 1 K. B. 283: "I have not been able to find nor have we been furnished with any decision as to the case of a man who says that he is of no nationality. Modern national legislation has allowed persons to procure nationality in countries which are not the countries of their nationality of origin; but it is going a step further to say that any country has recognized that a man can shake off his position as a national of the country in which he was born without acquiring the duties and responsibilities of a national of some other country. This applicant might long ago have procured nationalization in this country. He has not done so, and, as at present advised, I think that he must be taken, as far as this country is concerned, to be still retaining his nationality of origin." It will be observed that Phillimore L. J. gives no authority for his statement. In the House of Lords the point was specifically kept open. I lay no stress on the fact that an official publication like the London Gazette describes persons as of no nationality; but, s. 4 of the Naturalization Act, 1870, and s. 14 of the British Nationality and Status of Aliens Act, 1914, deserve attention. The latter Act repeals the former, and s. 4 of the 1870 Act is replaced by s. 14 of the 1914 Act. It is only necessary to refer to the latter section. It is in the following terms: "(1) Any person who by reason of his having been born within His Majesty's dominions and allegiance or on board a British ship is a natural-born British subject, but who at his birth or during his minority became under the law of any foreign

state a subject also of that state, and is still such a subject, may, if of full age and not under disability, make a declaration of alienage, and on making the declaration shall cease to be a British subject." Sub-s. 2 provides: "Any person who though born out of His Majesty's dominions is a natural-born British subject may, if of full age and not under disability, make a declaration of alienage, and on making the declaration shall cease to be a British subject." It will be seen that sub-s. 1 only enables a person of the class mentioned to cease to be a British subject, who at the time of cesser is a subject of some foreign state. On the other hand under sub-s. 2, a person of the class there mentioned can cease to be a British subject even though at the time of cesser he is not a subject of some foreign state. Thus the son born in Germany of a British subject who was born in England is certainly not a German by German law. He is by English law a natural-born British subject. He may on attaining twenty-one (even though he is not a subject of any foreign state) cease to be a British subject. He will thereby no doubt become an alien. He will not thereby become a German. I confess I cannot see what he is, if he is not stateless. Take again the case of an illegitimate child born in Germany of an English mother. The child by German law is not of German nationality, and by English law is not of English nationality. The child must, it seems to me, be stateless. Reference was made by the defendant to s. 1 of the British Nationality and Status of Aliens Act, 1918, which substitutes new ss. 7 and 7a for s. 7 of the Act of 1914. By the new s. 7a, sub-s. 3, it is provided that "where a certificate of naturalization is revoked the former holder thereof shall be regarded as an alien and as a subject of the state to which he belonged at the time the certificate was granted." It was argued that that presupposed that every one must have a state to which he belongs; I do not agree. The provision is not inconsistent with the idea of "statelessness," and is only applicable if the grantee of the certificate was at the date of the grant a subject of another state. If he were not such a subject, the effect of the revocation would be merely to cause him to be regarded as an alien. Reliance was also placed on s. 2, sub-s. 1, of the Aliens Restriction (Amendment) Act, 1919, as showing that the statute recognizes the advisability of ascribing nationality to aliens whose nationality may be in doubt. This may well be so more particularly where the object of the legislation is to enable restrictions to be imposed on aliens; but the sub-section does not appear to throw any light upon the points under consideration. The Act, however, does afford another instance in which the statute law of this country appears to entertain the possibility of a person being stateless. Sect. 1, sub-s. 2, empowers His Majesty by order in council to make regulations requiring information to be given as to the property of "former aliens" and this with a view to enforce the provisions of any Treaty of Peace concluded or to be concluded with any Power with which His

Majesty was at war in the year 1918. The date of the Act is December 23, 1919. The Treaty of Peace with Germany had then been signed, although neither it nor the Treaty of Peace Order had come into force. Sect. 15 of the Act defines the expression "former enemy alien," and in that definition are included both (a) a person who *is* a subject or citizen of the German Empire or any component state thereof, or of Austria, Hungary, Bulgaria or Turkey; and (b) a person who (having at any time been such subject or citizen) has not changed his allegiance as therein mentioned or been naturalized in any other foreign state or in any British Possession as therein mentioned, *and* does not retain according to the law of his state of origin the nationality of that state. The definition appears to contemplate, or at all events it will include, the case of a denationalized German who has not acquired any other nationality. The dearth of direct authority in English law upon this point is not to be wondered at. In truth the question of statelessness can have seldom arisen as an important or practical question. The division into subjects and aliens is clear and sufficient for the ordinary purposes of the common law; and the stateless person would be one of the aliens. But the present case has raised the question, and, upon consideration of the arguments addressed to me and the statutory enactments before referred to, I hold that the condition of a stateless person is not a condition unrecognized by the municipal law of this country.

There remains for consideration the contention that the words "German national" in the Treaty of Peace Order, and s. IV. of Part X. of the Treaty of Peace, mean or include a German national according to English law. I confess I have difficulty in following this. Whether a person is a national of a country must be determined by the municipal law of that country. Upon this I think all text writers are agreed. It would be strange were it otherwise. How could the municipal law of England determine that a person *is* a national of Germany? It might determine that for the purposes of English municipal law a person shall be deemed to be a national of Germany, or shall be treated as if he were a national of Germany; but that would not constitute him a national of Germany, if he were not such according to the municipal law of Germany. In truth there is not and cannot be such an individual as a German national according to English law; and there could be no justification for interpreting or expanding the words "German national" in the manner suggested.

In the result the plaintiff is entitled to the following declaration which I make accordingly: Declare that the plaintiff was not on January 10, 1920, a German national within the meaning of the Treaty of Peace Order, 1919, or within the meaning of s. IV. of Part X. of the Treaty of Peace therein mentioned which is set out in the Schedule thereto, and as to which it is thereby ordered that it shall have full force and effect as law.

§ 38. "STATELESSNESS" OR NO NATIONALITY (*Continued*)

NOTE BY THE EDITOR

"Statelessness" is the term used to describe the legal situation of a person who does not possess the nationality of any State under its laws. It should be sharply distinguished from those cases in which a government declines to give its protection to a person who is avowedly its national. The question of what protection should be extended to nationals is necessarily one which must be determined by the State, even though the essence of nationality be considered as the exchange of allegiance on the part of the individual for protection on the part of the State. In Moore, *Digest*, I, 757 ff., are listed instances in which the government has declined to extend protection to American citizens, usually in cases where they have voluntarily emigrated to take up a permanent residence in a foreign State, without intention to return to the United States. The length of the period of absence, the establishment of business interests in the foreign State, the holding of office or other active participation in political affairs, are all important considerations in determining the intent, or lack of intent, to return. Nevertheless, none of these conditions in themselves work a loss of citizenship or nationality, which can only be brought about by the operation of the laws of the State on the particular individual in such a way that he does not possess the State's citizenship or nationality.

C. Seckler-Hudson, in her study, *Statelessness: With Special Reference to the United States* (1934), says that "from the point of view of the United States, there is a total of approximately eighty-six different conditions or circumstances causing statelessness." Among them she lists various effects of legislation as to the effects of marriage on the nationality of women (see § 41 below); "persons who have taken an oath of allegiance to a foreign government"; "persons who have suffered revocation of their certificates of naturalization by judicial action"; "persons who have suffered denationalization in a foreign country and reside in the United States," and others.¹

Seckler-Hudson also lists some disadvantageous consequences of statelessness, both to the individuals and to the States concerned. For individuals, these include: possible loss of suffrage and of capacity to hold office; possible incapacity under local laws to teach in the public schools, or practice law or medicine; loss of any claim to protection by the United States while in a foreign country; inability to procure an American passport; inability to take advantage of the homestead laws; incapacity (as an alien, under laws in some American states) to inherit or to hold real property; and many others.

¹ Pp. 20-22.

For States, the disadvantageous consequences include: possible inability to deport to any other State stateless persons, e.g., when they become public charges; and the social difficulties of having considerable groups in the State which, since they have no claim to protection from it, are likely to feel no sense of responsibility, much less allegiance, towards it.²

The 1930 Hague Conference for the Codification of International Law produced three international instruments dealing with the question of statelessness, of which the *Convention on Certain Questions Relating to the Conflict of Nationality Laws* was most important. (See § 42.) Articles 7-17, dealing with such important producers of statelessness as expatriation permits, laws relating to the nationality of married women, laws relating to the nationality of children, and laws relating to adoption, represent the most significant attack yet made by the international community upon the problems of statelessness, though they are still far from solution.

The 1930 Conference also produced two Protocols dealing with special aspects of statelessness. The *Protocol Relating to a Special Case of Statelessness* is now in force (1939) as between Brazil, Colombia, Cuba, El Salvador, Great Britain, India, Poland, China, Chile, Australia, South Africa, the Netherlands, and the United States. It provides: "ARTICLE 1. In a State whose nationality is not conferred by the mere fact of birth in its territory, a person born in its territory of a mother possessing the nationality of that State and of a father without nationality or of unknown nationality shall have the nationality of the said State." Subsequent articles make it clear that matters not covered by this principle remain subject to existing international law, and that existing treaties relating to nationality between the Parties are not affected. Certain other States may accede.³ The problem dealt with in Article 1 is not one that is raised by the law of the United States, since all persons born in the United States and subject to the jurisdiction thereof are citizens. This Protocol deals only with the one special case.

The other instrument of the Hague Conference, the *Special Protocol Concerning Statelessness*, does not deal with the problem of conferring nationality on stateless persons, but provides for the *admission* of certain groups of stateless persons into States whose nationality they once possessed. Even so, it is not in force, having been ratified (1939) by seven States only of the ten required by its Article 9: Brazil, Great Britain, Australia, South Africa, India, China, and El Salvador. Its Article 1 provides:

If a person, after entering a foreign country, loses his nationality without acquiring another nationality, the State whose nationality he last possessed is bound to admit him, at the request of the State in whose territory he is: (i) if

² *Ibid.*, pp. 244-253.

³ *Publications of the League of Nations. V. Legal Questions. 1930. V. 5.*, as reprinted in 24 *A.J.I.L.* (Supp., 1930), 206.

he is permanently indigent either as a result of an incurable disease or for any other reason; or (ii) if he has been sentenced, in the State where he is, to not less than one month's imprisonment and has either served his sentence or obtained total or partial remission thereof. In the first case the State whose nationality such person last possessed may refuse to receive him, if it undertakes to meet the cost of relief in the country where he is as from the thirtieth day from the date on which the request was made. In the second case the cost of sending him back shall be borne by the country making the request.

Except as modified by this Article, existing rules of international law are to remain in force, and treaties in force relating to nationality are not affected.⁴

§ 39. DUAL NATIONALITY

United States (Alexander Tellech) v. Austria and Hungary

UNITED STATES-AUSTRIA AND HUNGARY, TRIPARTITE CLAIMS
COMMISSION, 1928

Decisions and Opinions (1929), p. 71.

PARKER, Commissioner. This claim is put forward by the United States on behalf of Alexander Tellech for compensation for time lost and for alleged suffering and privation to which he was subjected, first through internment in Austria, and then through enforced military service in the Austro-Hungarian army. The claimant was born in the United States of Austrian parents on May 14, 1895. Under the Constitution and laws of the United States he was by birth an American national. Under the laws of Austria he also possessed Austrian nationality by parentage. This created a conflict in citizenship, frequently described as "dual nationality." When the claimant was five years of age he accompanied his parents to Austria, where he continued to reside.

In August, 1914, the claimant, while residing in Austria a short distance from the Russian border, was subjected to preventive arrest as an agitator engaged in propaganda in favor of Russia. After investigation he was interned and confined in internment camps for sixteen months. He then took the oath of allegiance to the Emperor of Austria and King of Hungary and was impressed into service in the Austro-Hungarian army. A decision of the sharply controverted claim that this oath was taken under duress and that he protested that he was an American citizen is not necessary to a disposition of this case. It appears that in 1915 and later representatives of the Govern-

⁴ *Publications of the League of Nations. V. Legal Questions. 1930. V. 6.*, as reprinted in 24 *A.J.I.L. (Supp., 1930)*, 211.

ment of the United States in Austria interested themselves in securing his release, but the application was denied.

In July, 1916, the claimant deserted from the Austro-Hungarian army and escaped into Russia, where he was arrested and held by the Russian army authorities as a prisoner of war until the outbreak of the Kerensky revolution, when he was released and thereupon returned to Prague, where he still lives and where he is practicing medicine.

The action taken by the Austrian civil authorities in the exercise of their police powers and by the Austro-Hungarian military authorities, of which complaint is made, was taken in Austria, where claimant was voluntarily residing, against claimant as an Austrian citizen. Citizenship is determined by rules prescribed by municipal law. Under the law of Austria, to which claimant had voluntarily subjected himself, he was an Austrian citizen. The Austrian and the Austro-Hungarian authorities were well within their rights in dealing with him as such. Possessing as he did dual nationality, he voluntarily took the risk incident to residing in Austrian territory and subjecting himself to the duties and obligations of an Austrian citizen arising under the municipal laws of Austria.

Assuming that the claimant suffered the loss and injury alleged and had not lost his American citizenship by taking the Austrian army oath, the Commissioner finds no provision of the Treaty of Vienna or of Budapest obligating Austria and/or Hungary to make compensation therefor.

Wherefore the Commission decrees that under the Treaty of Vienna and the Treaty of Budapest the Government of Austria and the Government of Hungary are not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

§ 40. DUAL OR MULTIPLE NATIONALITY: LIABILITY TO MILITARY SERVICE

NOTE BY THE EDITOR

From the point of view of States, the objection to dual nationality or multiple nationality is that the individual possessing such nationality is able to avoid duties—such as military service, for one example—required of him as a national of one State, by claiming his nationality in the other, so long as he is resident in the other State. From the point of view of the individual, the existence of duties connected with one of his nationalities may make it difficult to visit the State requiring these duties, though he may have strong reasons for doing so. The United States Department of State has uniformly declined to intervene to protect American citizens who, being nationals of another State by its law, revisit that State.¹ The Department of State, in its

¹ See instances in Moore, *Digest*, III, 518-551.

Notice to Bearers of Passports, issued customarily with each passport, warns passport holders: "Persons born in the United States of unnaturalized parents are American citizens under American law, but they may also be citizens or subjects of the country of their parents' origin under the law of that country. As the legal right of the other country to the allegiance of such persons while within their territory can not be denied by this Government, the Department can offer no assurances to them that any representations which it may make on their behalf will be successful."² The *Convention on Certain Questions Relating to Nationality Laws* provides: "ARTICLE 4. A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses."

A similar principle is applied by arbitration tribunals, which refuse to entertain claims by one State against another on behalf of an individual claimant when the individual is a national of both States under their respective laws. This is illustrated by the *Tellech Case*, § 39 above. In the *Canevaro Case*, decided in 1912 by the Hague Permanent Court of Arbitration as between Italy and Peru, the Tribunal refused to pass judgment on the claim of Rafael Canevaro, who possessed both Italian and Peruvian nationalities.³ In a British case, however, the fact that an individual possessed both British and German nationalities did not protect him from having his property dealt with as that of a "German national" under the Treaty of Peace and the Treaty of Peace Order (see § 37 above). "All that has to be proved . . . is that the person concerned is a German national according to German municipal law. If that fact be proved then the person concerned comes within the operation of the Treaty and Order, although he may also be a national of some other State, even though that State be Great Britain, *and even though, according to our law, he would be deemed not to be a German subject.*" (Italics are the editor's.) The case seems hard, though the Court pointed out that the custodian could release the property "in all proper cases."⁴

Where arbitration tribunals have to decide the effective nationality of a claimant who possesses two nationalities, only one of which is that of a State before the tribunal, the tribunal will examine the question whether the claimant possesses the nationality of the appearing State. If the claimant has the nationality of an appearing State, the claim will be entertained, even if he possesses also the nationality of a State not before the tribunal.⁵

² Issue of 1935, p. 10.

³ Wilson, *Hague Arbitration Cases* (1915), pp. 238, 245.

⁴ *In re Chamberlain's Settlement*, L. R. [1921] 2 Ch. 533.

⁵ See the *Flutie Cases*, United States-Venezuela Arbitration of 1903, *Ralston's Report*, p. 38; the *William Mackenzie Case*, United States-Germany Mixed Claims Commission, 1926, *Decisions and Opinions of the Commission*, p. 628; and the *Case of Baron Frederic de Born*, Hungary-Yugoslavia, Mixed Arbitral Tribunal, 1926, 6 *Recueil des décisions des tribunaux arbitraux mixtes*, p. 501.

Arbitration tribunals examine the nationality of individual claimants because States only are parties to international arbitrations, and before a State is recognized as having the right to present a claim on behalf of an individual, the tie of nationality between him and the claiming State must be established. In investigating the nationality of individual claimants, arbitration tribunals regard themselves as bound by the principle that nationality is determined by the law of the conferring State; but the investigation by the tribunal is independent, and it may come to conclusions different from those of the authorities of the State concerned. The mere claim by a State that an individual has its nationality for purposes of presenting an international claim does not bind an international tribunal. In the *Flutie Cases*, cited above, the tribunal came to the conclusion that E. A. Flutie, a Syrian by birth, was not an American citizen although he had a certificate of naturalization, because in its judgment American statutes had been improperly applied by the United States court which granted the certificate. The tribunal declined to entertain the claim.⁶

Recent efforts have succeeded to some extent (as between particular States) in clearing up certain problems arising from dual nationality. In 1930 the United States and Norway entered into a treaty which provided:

ARTICLE I. A person born in the territory of one party of parents who are nationals of the other party, and having the nationality of both parties under their laws, shall not, if he has his habitual residence, that is, the place of his general abode, in the territory of the State of his birth, be liable for military service or any other act of allegiance during a temporary stay in the territory of the other party. Provided, that, if such stay is protracted beyond the period of two years, it shall be presumed to be permanent, in the absence of sufficient evidence showing that return to the territory of the other party will take place within a short time.⁷

One of three conventions on nationality questions signed at the Hague Conference for the Codification of International Law (1930) was an important *Protocol Relating to Military Obligations in Certain Cases of Double Nationality*, which is now effective (1939) as between the United States, Great Britain, Brazil, India, Sweden, Australia, El Salvador, South Africa, Cuba, Colombia and the Netherlands. This Protocol provides:

ARTICLE I. A person possessing two or more nationalities who habitually resides in one of the countries whose nationality he possesses, and who is in fact most closely connected with that country, shall be exempt from all military obligations in the other country or countries. This exemption may involve the loss of the nationality of the other country or countries.

⁶ See also *Medina, Angarica, and Lizardi Cases*, Moore, *Arbitrations*, pp. 2583, 2621, and 2587; *Salem Case*, Department of State, *Arbitration Series*, No. 4.

⁷ U.S.T.S., No. 832.

ARTICLE 2. Without prejudice to the provisions of Article 1 of the present Protocol, if a person possesses the nationality of two or more States and, under the law of any one of such States, has the right, on attaining his majority, to renounce or decline the nationality of that State, he shall be exempt from military service in such State during his minority.

ARTICLE 3. A person who has lost the nationality of a State under the law of that State and has acquired another nationality, shall be exempt from military obligations in the State of which he has lost the nationality.

ARTICLE 4. The High Contracting Parties agree to apply the principles and rules contained in the preceding article in their relations with each other, as from the date of the entry into force of the present Protocol. The inclusion of the above-mentioned principles and rules in the said article shall in no way be deemed to prejudice the question whether they do or do not already form part of international law. It is understood that, in so far as any point is not covered by any of the provisions of the preceding articles the existing principles and rules of international law shall remain in force.

ARTICLE 5. Nothing in the present Protocol shall affect the provisions of any treaty, convention or agreement in force between any of the High Contracting Parties relating to nationality or matters connected therewith. (Articles 6-17 are omitted.)⁸

Borchard says, "While the United States has naturalization treaties with most of these States and they are not the States, such as France, Italy, and Switzerland, with which the United States has had the main difficulties in the matter of military service of persons possessing two nationalities, it is nevertheless a source of gratification that the principle of single military service has now received the imprimatur of an international convention. Probably other ratifications and accessions will follow."⁹

§ 41. EFFECT OF MARRIAGE UPON NATIONALITY OF WOMEN

NOTE BY THE EDITOR

Special problems of dual nationality and statelessness were created by the passage of the Cable Act of September 22, 1922. (For text, see pages 160 ff., above.) Briefly stated, the principles of this Act were: (1) that alien women who married American citizens, or whose alien husbands were naturalized after the passage of the Act, should not become American citizens by the fact of their marriage, but should undergo an independent, though shortened, process of naturalization; (2) that women citizens of the United

⁸ *Publications of the League of Nations. V. Legal Questions. 1930. V. 4., as reprinted in 24 A.J.I.L. (Supp., 1930), 201.*

⁹ "Three Hague Conventions on Nationality," 32 *A.J.I.L.* (1938), 126, at 128.

States who married aliens should not lose their citizenship by virtue of their marriage, but only by an independent and formal renunciation of citizenship before a court having jurisdiction over the naturalization of aliens.

The difficulty with this attempt to make the nationality of married women independent of that of their husbands was that the legislation of most States provided that when alien women married their nationals, such women unconditionally acquired their husbands' nationality; and the legislation of many States provided that if women of their nationality married aliens, they lost unconditionally the nationality of those States, without reference to whether such women acquired by marriage the husband's nationality under the legislation of the husband's State. Such legislation was based upon the simple principle that the nationality of the wife should follow that of the husband. Combined with the principle that the nationality of minor children followed that of the father, the central idea was clear that different members of the same family should not possess different nationalities. An example of these principles is provided in the British Nationality and Status of Aliens Act, 1914, as amended (4-5 Geo. V, C. 17):

10. The wife of a British subject shall be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien: Provided that, where a man ceases during the continuance of his marriage to be a British subject, it shall be lawful for his wife to make a declaration that she desires to retain British nationality, and thereupon she shall be deemed to remain a British subject, and provided that where an alien is a subject of a state at war with His Majesty it shall be lawful for his wife if she was at birth a British subject to make a declaration that she desires to resume British nationality, and thereupon the Secretary of State, if he is satisfied that it is desirable that she be permitted to do so, may grant her a certificate of naturalization.

11. A woman who, having been a British subject, has by, or in consequence of, her marriage become an alien, shall not, by reason only of the death of her husband, or the dissolution of her marriage, cease to be an alien, and a woman who, having been an alien, has by, or in consequence of, her marriage, become a British subject, shall not, by reason only of the death of her husband or the dissolution of her marriage, cease to be a British subject.

Now, suppose that a woman who is a British subject marries a citizen of the United States. Under the British legislation above, she has lost her British nationality; but if the marriage took place after the enactment of the Cable Act in 1922, she does not become a United States citizen until she has been naturalized independently. During the interval she is stateless, and under the operation of American immigration laws she may be prevented from entering the United States. Many such cases occurred. Again, suppose that a woman who is a United States citizen marries a British subject. Under the British legislation above, she is deemed to be a British subject; but if the

marriage took place after the enactment of the Cable Act of 1922, she does not cease to be a United States citizen by virtue of her marriage, but only by virtue of her formal renunciation of United States citizenship or other statutory process. She may continue for a longer or shorter interval to possess both British and United States nationality. These simplified explanations are typical of a great many cases which arose.¹

National legislation on the subject of the effect of marriage on the nationality of alien women who marry nationals, and of women who are nationals and who marry aliens, is bewildering in its variety. In Soviet Russia, marriage does not appear to have any effect whatever on the nationality of women. In Turkey, an alien woman acquires nationality unconditionally through marriage to a Turkish national, but a Turkish woman does not lose her nationality in any case through marriage to an alien. In China, an alien woman acquires Chinese nationality unconditionally through marriage to a Chinese national, but a woman of Chinese nationality who marries an alien loses her Chinese nationality only under special conditions, and if she acquires the nationality of her husband. The same principle holds good for Italy and Japan. In France, an alien woman by marriage to a French national acquires French nationality only under certain conditions, and a woman of French nationality marrying an alien loses her French nationality only under certain conditions. In the case of Denmark, an alien woman acquires Danish nationality unconditionally through marriage to a Danish national.²

Subsequent United States legislation has modified the Cable Act (see pages 160-163 above), but its essential principles as described above have not been changed. The United States ratified the *Montevideo Convention on the Nationality of Women* of 1933, according to which the ratifying States agreed upon the following: "There will be no distinction based on sex as regards nationality, in their legislation or in their practice."³ Other States ratifying were (1939): Brazil, Colombia, Chile, Ecuador, Guatemala, Honduras (with reservations), Mexico (with reservations), and Panama. The United States Act, May 30, 1934 (see page 161) places alien men who marry citizens of the United States on the same basis with alien women who marry

¹ For examples, see Seckler-Hudson, *Statelessness*, pp. 54-99.

² For a convenient collection of texts of laws of the various States, consult Flournoy and Hudson, *A Collection of Nationality Laws* (1929); and for a precise analysis of the contents of these laws, see Appendix No. 1 to the Harvard Law School Research in International Law, "The Law of Nationality," in 23 *A.J.I.L. (Spec. Supp., 1929)*, 106-113.

For the somewhat similar cases of conflicting legislation causing statelessness when husband or wife changes national status during the marriage, and conflicting legislation affecting the nationality of minor and illegitimate children, see the same sources. Lack of space forbids further consideration of these topics here.

³ *U.S.T.S.*, No. 875.

such citizens, but both alien men and alien women have to go through a process of naturalization as prescribed, and the marriage itself does not work the acquisition of United States citizenship for alien men any more than for alien women.

§ 42. CONVENTION ON CERTAIN QUESTIONS RELATING TO THE CONFLICT OF NATIONALITY LAWS, 1930

The Convention reprinted below was the outgrowth of a long period of discussion of the problems of statelessness and dual nationality. It was proposed by the Hague Conference of 1930 for the Codification of International Law. Although signed by thirty-one States on April 12, 1930, it came into effect only on July 1, 1937, as between the following States: Australia, Brazil, Canada, China, Great Britain, India, Monaco, Netherlands, Norway, Poland, and Sweden. The United States did not sign or ratify on account of its attitude on expatriation. This Convention, the two Protocols on Statelessness, and the Protocol on Military Obligations in Certain Cases of Double Nationality were made possible partly by the previous world-wide scholarly discussion, which is represented in an unusually significant documentation. Outstanding in this documentation are the *Report of the First Committee (Nationality) of the Hague Conference, League of Nations Document, C. 229. M. 116. 1930. V. 8*, conveniently accessible also in 24 *A.J.I.L. (Supp., 1930)*, 215 ff.; and "The Law of Nationality" of the Harvard Law School Research in International Law (*Special Supp.*, April, 1929), 13-129, already referred to.

It should be understood that this Convention and the other results of the Hague Conference have not solved all outstanding problems of statelessness and dual nationality. Speaking of the unwillingness of the delegates of the various States to consider treaty rules which would have required significant changes in national legislation, Hudson remarks: "It is this background which explains the failure of the Conference to grapple with some of the major problems of the law of nationality. It prevented any serious consideration of the possibility of limiting the application of the *jus sanguinis* to the remote generations. It also foreclosed the possibility of establishing the principle that naturalization abroad terminated prior nationality, though the Conference did adopt a *vœu* recognizing it to be 'desirable that states should apply the principle that the acquisition of a foreign nationality through naturalization involves the loss of a previous nationality.' Nor could any agreement be reached with regard to the general office to be served by expatriation permits, though the same *vœu* recognizes it to be desirable that before proceeding to the naturalization of aliens, states should ascertain that the aliens are in a position to fulfil the conditions set for the loss of their existing nationality. The Conference likewise failed to deal with the question of proof of naturalization in connection with international claims, a matter which has often vexed the patience of international tribunals. So many questions were left open, both as to statelessness and as to multiple nationality, that the Conference felt itself bound to suggest their future consideration by the League of Nations."—"The First Conference for the Codification of International Law," 24 *A.J.I.L. (1930)*, 447, at 455.

Text below as reprinted in 24 *American Journal of International Law*
(*Supp.*, July, 1930), 192-195.

[Names of the High Contracting Parties.]

Considering that it is of importance to settle by international agreement questions relating to the conflict of nationality laws;

Being convinced that it is in the general interest of the international community to secure that all its members should recognise that every person should have a nationality and should have one nationality only;

Recognising accordingly that the ideal towards which the efforts of humanity should be directed in this domain is the abolition of all cases both of statelessness and of double nationality;

Being of opinion that, under the economic and social conditions which at present exist in the various countries, it is not possible to reach immediately a uniform solution of all the above-mentioned problems;

Being desirous, nevertheless, as a first step toward this great achievement, of settling in a first attempt at progressive codification, those questions relating to the conflict of nationality laws on which it is possible at the present time to reach international agreement,

Have decided to conclude a Convention and have for this purpose appointed as their Plenipotentiaries:

[Designation of Plenipotentiaries.]

Who, having deposited their full powers found in good and due form, have agreed as follows:

CHAPTER I. GENERAL PRINCIPLES

ARTICLE 1. It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.

ARTICLE 2. Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.

ARTICLE 3. Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses.

ARTICLE 4. A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.

ARTICLE 5. Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall, of the nationalities which any such person possesses, recognise exclusively in its territory either the nationality of the country in

which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.

ARTICLE 6. Without prejudice to the liberty of a State to accord wider rights to renounce its nationality, a person possessing two nationalities acquired without any voluntary act on his part may renounce one of them with the authorisation of the State whose nationality he desires to surrender.

This authorisation may not be refused in the case of a person who has his habitual and principal residence abroad, if the conditions laid down in the law of the State whose nationality he desires to surrender are satisfied.

CHAPTER II. EXPATRIATION PERMITS

ARTICLE 7. In so far as the law of a State provides for the issue of an expatriation permit, such a permit shall not entail the loss of the nationality of the State which issues it, unless the person to whom it is issued possesses another nationality or unless and until he acquires another nationality.

An expatriation permit shall lapse if the holder does not acquire a new nationality within the period fixed by the State which has issued the permit. This provision shall not apply in the case of an individual who, at the time when he receives the expatriation permit, already possesses a nationality other than that of the State by which the permit is issued to him.

The State whose nationality is acquired by a person to whom an expatriation permit has been issued, shall notify such acquisition to the State which has issued the permit.

CHAPTER III. NATIONALITY OF MARRIED WOMEN

ARTICLE 8. If the national law of the wife causes her to lose her nationality on marriage with a foreigner, this consequence shall be conditional on her acquiring the nationality of the husband.

ARTICLE 9. If the national law of the wife causes her to lose her nationality upon a change in the nationality of her husband occurring during marriage, this consequence shall be conditional on her acquiring her husband's new nationality.

ARTICLE 10. Naturalization of the husband during marriage shall not involve a change in the nationality of the wife except with her consent.

ARTICLE 11. The wife who, under the law of her country, lost her nationality on marriage shall not recover it after the dissolution of the marriage except on her own application and in accordance with the law of that country. If she does recover it, she shall lose the nationality which she acquired by reason of the marriage.

CHAPTER IV. NATIONALITY OF CHILDREN

ARTICLE 12. Rules of law which confer nationality by reason of birth on the territory of a State shall not apply automatically to children born to persons enjoying diplomatic immunities in the country where the birth occurs.

The law of each State shall permit children of consuls *de carrière*, or of officials of foreign States charged with official missions by their Governments, to become divested, by repudiation or otherwise, of the nationality of the State in which they were born, in any case in which on birth they acquired dual nationality, provided that they retain the nationality of their parents.

ARTICLE 13. Naturalisation of the parents shall confer on such of their children as, according to its law, are minors the nationality of the State by which the naturalisation is granted. In such case the law of that State may specify the conditions governing the acquisition of its nationality by the minor children as a result of the naturalisation of the parents. In cases where minor children do not acquire the nationality of their parents as the result of the naturalisation of the latter, they shall retain their existing nationality.

ARTICLE 14. A child whose parents are both unknown shall have the nationality of the country of birth. If the child's parentage is established, its nationality shall be determined by the rules applicable in cases where the parentage is known.

A foundling is, until the contrary is proved, presumed to have been born on the territory of the State in which it was found.

ARTICLE 15. Where the nationality of a State is not acquired automatically by reason of birth on its territory, a child born on the territory of that State of parents having no nationality, or of unknown nationality, may obtain the nationality of the said State. The law of that State shall determine the conditions governing the acquisition of its nationality in such cases.

ARTICLE 16. If the law of the State, whose nationality an illegitimate child possesses, recognises that such nationality may be lost as a consequence of a change in the civil status of the child (legitimation, recognition), such loss shall be conditional on the acquisition by the child of the nationality of another State under the law of such State relating to the effect upon nationality of changes in civil status.

CHAPTER V. ADOPTION

ARTICLE 17. If the law of a State recognises that its nationality may be lost as the result of adoption, this loss shall be conditional upon the acquisition by the person adopted of the nationality of the person by whom he is adopted, under the law of the State of which the latter is a national relating to the effect of adoption upon nationality.

CHAPTER VI. GENERAL AND FINAL PROVISIONS

ARTICLE 18. The High Contracting Parties agree to apply the principles and rules contained in the preceding articles in their relations with each other, as from the date of the entry into force of the present Convention.

The inclusion of the above-mentioned principles and rules in the Convention shall in no way be deemed to prejudice the question whether they do or do not already form part of international law.

It is understood that, in so far as any point is not covered by any of the provisions of the preceding articles, the existing principles and rules of international law shall remain in force.

ARTICLE 19. Nothing in the present Convention shall affect the provisions of any treaty, convention or agreement in force between any of the High Contracting Parties relating to nationality or matters connected therewith.

[Articles 20-31 are omitted.]

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QUESTIONS AND PROBLEMS

Students are urged to read all the materials in the chapter before attempting to deal with the questions and problems.

1. What was the subject matter of the dispute between Great Britain and France in § 34? Was this subject matter submitted to the World Court (Permanent Court of International Justice)? Was any subject matter submitted to the Court by Great Britain and France? What action was the World Court asked to take? Could the World Court have been asked to take any other action? (See *Statute of the Permanent Court of International Justice*, § 116.) Did the action taken by the World Court settle the dispute between Great Britain and France? What was the effect of the action taken?

What was the precise nature of the question asked of the Court? Was this question asked in terms of any existing treaties binding Great Britain and France?

Were nationality questions in general considered by the Court to be "solely within the domestic jurisdiction" of a State? Might the Court, for instance, hold that the provision of Amendment XIV to the Constitution of the United States, that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside" could be questioned internationally by, say, Germany?

What attitude did the Court finally take in this instance? Did it come to this conclusion because it thought all nationality questions were international in character? Indicate the general character of the evidence which led the Court to its conclusions. What do you think of this evidence and the use the Court makes of it?

On the basis of this document, how would you formulate a general principle as to the national or international character of nationality questions? Tariff questions? Immigration questions? Can you see any difficulties as to nationality which might arise in the application of your formula?

2. What is "nationality"? A "national"? Is nationality the same as citizenship? Explain. In what ways is nationality acquired? What is the principle of *jus soli*? Of *jus sanguinis*? Are these two principles supplementary or contradictory? Give examples of States whose legislation combines these principles in different ways. Describe the facts and the ruling in the case of *Wong Kim Ark*. Was the ruling in this case based on *jus sanguinis* or *jus soli*? What examples of *jus soli* can you find in the United States legislation reprinted in § 36? *Jus sanguinis*? Are the provisions concerning naturalization in this legislation examples of *jus soli*? Of *jus sanguinis*? What is collective naturalization? Is it a case of *jus soli*? Of *jus sanguinis*? Why is it that the application of these principles by different States can produce statelessness, or no nationality? Dual nationality? Triple nationality? Are such problems merely national? To the extent that they are not, what devices are necessary to solve them?

3. Do the following persons possess American nationality?

(a) A was born in France, the son of a father naturalized in the United States in 1920, when A was five years old.

(b) B was born in Great Britain, the son of an American father. B reached the age of twenty-five years without ever having resided in the United States.

(c) C was born in Germany in 1936. His mother is an American citizen who married his father, a German national, in 1935.

(d) D was born in Germany in 1920. His mother is an American citizen who married his father, a German national, in 1915.

(e) Mrs. E, born in Denmark, emigrated to the United States when five years old. Her parents were never American citizens. She married a Danish national in the United States in 1915, and Mr. E took out his first papers in 1917. In 1919 Mrs. E obtained a divorce, before Mr. E took out second papers. Mrs. E never became naturalized independently. She has resided in the United States sixty-five years.

(f) Mrs. F was born in Wisconsin. In 1920 she married a British subject, who died in 1925. Would it make any difference as to Mrs. F's nationality if the marriage had occurred in 1927? 1936?

(g) G is the grandson of Chinese grandparents, both of whom were born in the United States, and returned to China shortly after G's birth. Neither they nor G's parents subsequently resided in the United States.

(h) H, born in Switzerland, was naturalized in the United States in 1910. In 1915 he returned to Switzerland, where he remained for ten years without returning to the United States.

(i) I, born in the United States, is naturalized as a Russian citizen.

4. What is "the right of expatriation"? What is the attitude of the United States on this problem, as embodied in its legislation? Is this attitude generally shared? Does United States legislation require that Russian nationals must either receive the consent of Russia or complete their Russian military obligations before they can become naturalized as United States citizens? Does Russian legislation require this? Answer the same questions with respect to Japanese nationals. Where a foreign State requires that its nationality cannot be lost without its consent, does this mean that the United States authorities cannot proceed to naturalize the nationals of such a State? What are your conclusions about this? What are the provisions of the *Convention on Certain Questions Relating to the Conflict of Nationality Laws* (§ 42) on this point? Do they settle the question for the United States?

5. Compare the role played by national courts with that played by international tribunals, in determining questions of nationality.

6. What was the precise question before the court in *Stoeck v. Public Trustee* (§ 37)? How was it decided? Why was the court concerned with the nationality of Stoeck? Was its concern the same as that of an arbitration tribunal called upon to determine the nationality of an individual? Explain. What sort of evidence did the court deem as conclusive with respect to Stoeck's nationality? What cases did it distinguish from Stoeck's case, and why? Did the court give any examples of how the status of a stateless person might arise?

7. What is statelessness? Is it the same thing as the denial of diplomatic protection? What are its disadvantages? Do you think it might in some respects be advantageous to be a stateless person? What were the provisions of the *Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws* (§ 42) with respect to statelessness? Of the *Protocol Relating to a Special Case of Statelessness* (§ 38)? Of the *Special Protocol Concerning Statelessness* (§ 38)? Can you think of cases of statelessness which would not be covered by any of these instruments?

8. What is dual nationality? Multiple nationality? In the case of *Alexander Tellech* (§ 39), why was Tellech an American citizen? Why was he an Austrian national? What was the claim made on his behalf and by whom was it made? Was it sustained? Why was the question of nationality important in the case? Would the claim have been decided in the same way if Tellech, possessing both United States and Austrian nationalities, had his claim presented by the United States to the Russian government on account of his treatment in Russia? Explain. Do you think the presentation of the claim before the Tripartite Claims Commission was consistent with the traditional attitude of the United States in similar cases? Explain.

9. What are the provisions of the *Convention on Certain Questions Relating to the Conflict of Nationality Laws* (§ 42) with respect to cases of dual or multiple nationality? Can you suggest problems of dual nationality that the provisions of this Convention would not solve even if it were universally adopted?

10. Does the Treaty of 1930 (§ 40) between the United States and Norway prevent a person's having both United States and Norwegian nationality? Explain. What is the purpose of the treaty?

11. The United States is supporting claims of the following persons (as American nationals) before a United States-Mexican Claims Commission in 1935. Should the Commission entertain them? Give reasons.

(a) A was born in the United States in 1900, and bought land in Sonora, Mexico, in 1919. Under Mexican law, purchase of land in Mexico confers Mexican nationality.

(b) B, a Mexican woman, married an American citizen in 1923, but has never resided in the United States.

(c) C, a woman naturalized in the United States, married a Mexican citizen in 1935.

(d) D was born in India in 1908. D's father, E, was an American citizen because his father, F, had been born in the United States.

(e) G's mother had been naturalized in the United States when G was ten years old, G's mother having been an Italian national.

(f) H was born of American parents in a territory occupied for the time being by enemy military forces of Canada.

12. "Action in the United States Court for China by A against B for assault committed at Hong Kong. A was born in Hong Kong, of British parents; B was born on a British vessel in port at Shanghai, of an American father and a Chinese mother who were married after B was born. B's father was born in Shanghai, and was on a visit to the United States at the time of B's birth. Has the court jurisdiction? Give reasons for your answer."—Department of State, *Examination for the Foreign Service*, September, 1932.

13. What is the principle relating to the nationality of married women adhered to in the legislation of most nations? What are the leading arguments for this principle? What other principles are there, and to what extent are they held? What reasons are advanced in support of these principles? Is each State entitled under international law to choose what principles it will apply in conferring its nationality upon women who marry its nationals? In declaring whether its women nationals who marry foreign nationals shall retain or lose their existing nationality? Show how the existing state of affairs may lead to a situation in

which a woman may have the nationality of two States. Of no State at all. Of three States.

Under legislation as existing in 1923, what nationalities has a woman of Chinese nationality who marries an American citizen? A woman of Turkish nationality who marries an American citizen? A woman of Russian nationality who marries an American citizen? A woman of French nationality who marries an American citizen and establishes a first residence in the United States after her marriage? A woman of English nationality who marries an American citizen?

14. Is the *Montevideo Convention on the Nationality of Women* (§ 41) in force? Is this Convention designed to cover the problems raised in § 41, or only a narrower problem? Consider the principle of this Convention carefully in the light of the statutory materials in § 36, and suggest changes in the American laws which may have been a result of American ratification of the Convention.

15. Is the *Protocol Relating to Military Obligations in Certain Cases of Double Nationality* (§ 40) in force? Do its provisions bind the United States?

Suppose that this Protocol had been ratified by all States. How would it apply in the following situations:

(a) A is born in France of American parents. When he reaches the age of eighteen France calls him to the colors. He has lived in France with his parents, but has visited the United States annually on vacations.

(b) B is born in the United States of parents of X nationality. The laws of State X confer X nationality on the children of fathers of X nationality wherever born. B never leaves the United States until he is twenty years old, when he enters State X on a tour with a number of other college students. State X arrests him for evasion of military obligations, required under X's law of all male nationals of X at their attaining the age of eighteen. Would B's rights under the Protocol differ from his rights were there no Protocol?

(c) C has taken out first papers in the United States. The laws of State Y, where C was born, provide that nationals of State Y lose such nationality from the moment when they voluntarily initiate proceedings to become naturalized in a foreign State. Before taking out second papers in the United States, C returns to State Y and goes into business. State Y calls him to the colors.

16. Answer the questions in any problem above selected by your instructor as they would be answered under the terms of the *Convention on Certain Questions Relating to the Conflict of Nationality Laws* (§ 42).

17. The following are translated from recent German laws and decrees: From *Reichsgesetzblatt*, 1935, p. 1146:

"§ 1—1. A German national (*Staatsangehöriger*) is one who belongs to the protective association of the German Reich to which he is therefore especially pledged.

"2. Nationality (*Staatsangehörigkeit*) shall be acquired in accordance with the prescriptions of the Reich and State Nationality Law.

"§ 2—1. He only is a citizen who is a national (*Staatsangehöriger*) of German or cognate blood and has shown by his behaviour that he is willing and fit loyally to serve the German people and Reich.

"2. Reich citizenship shall be acquired by the bestowal of a letter of patent of Reich citizenship.

"3. A Reich citizen is the sole bearer of full political rights in accordance with the law.

"§ 3—The Reich Minister of the Interior, in co-operation with the Deputy of the Leader, shall issue the legal and administrative stipulations for the execution and completion of the law."

Decree of April 11, 1933, *Reichsgesetzblatt*, 1933, I, 195:

"A non-Aryan is one who is descended from non-Aryan, particularly Jewish parents or grandparents. It suffices if one parent or one grandparent is non-Aryan. This obtains especially if one parent or one grandparent belonged to the Jewish faith."

Law regulating peasant holdings (September 29, 1933), *Reichsgesetzblatt*, 1933, I, § 13, 685:

"A person is not considered as of German or cognate blood if his paternal or maternal ancestors have Jewish or coloured blood in their veins."

Do these laws and decrees raise any questions of international law, so that the United States might protest to Germany on legal grounds?

VI

Jurisdiction

A. Acquisition of Territory

§ 43. DISCOVERY AND OCCUPATION

The methods by which a State may acquire valid title to territory are as follows: (1) discovery and occupation, treated in this section; (2) prescription, treated in § 43a; (3) conquest, treated in § 44; (4) accretion, treated in § 45; (5) treaty or cession, treated in § 46. Occupation and accretion are sometimes regarded as *original* modes of acquisition; and cession, conquest, and prescription as *derivative* modes.

On January 23, 1925, the United States and the Netherlands signed an agreement (*United States Treaty Series*, No. 711) under which, "desiring to terminate in accordance with the principles of international law and any applicable treaty provisions the differences which have arisen and now subsist between them with respect to the sovereignty over the Island of Palmas (or Miangas) . . .," the States agree "to refer the decision . . . to the Permanent Court of Arbitration at the Hague. The arbitral tribunal shall consist of one arbitrator. The sole duty of the arbitrator shall be to determine whether the Island of Palmas (or Miangas) in its entirety forms a part of territory belonging to the United States of America or of Netherlands territory. The two governments shall designate the arbitrator from the members of the Permanent Court of Arbitration. If they shall be unable to agree on such designation, they shall unite in requesting the President of the Swiss Confederation to designate the arbitrator." The two governments agreed to call upon Max Huber, member of the Permanent Court of Arbitration, to act as sole arbitrator, and he accepted. Below are printed certain portions of his award.

The Island of Palmas (Miangas)

ARBITRAL AWARD, SOLE ARBITRATOR OF THE PERMANENT COURT OF ARBITRATION, 1928

Publication of the International Bureau of the Permanent Court of Arbitration (1928) as reprinted in 22 *American Journal of International Law* (1928), pp. 866 ff.

By Huber, Arbitrator. [Part I is omitted.]

II. The subject of the dispute is the sovereignty over the Island of Palmas (or Miangas). The island in question is indicated with precision in the preamble to the special agreement, its latitude and longitude being specified. The fact that in the diplomatic correspondence prior to the conclusion of the Special Agreement, and in the documents of the arbitration proceedings, the United States refer to the "Island of Palmas" and the Netherlands to the "Island of Miangas," does not therefore concern the identity of the subject of the dispute. Such difference concerns only the question whether certain assertions made by the Netherlands Government really relate to the island described in the special agreement or another island or group of islands which might be designated by the name of Miangas or a similar name.

It results from the evidence produced by either side that Palmas (or Miangas) is a single, isolated island, not one of several islands clustered together. It lies about half way between Cape San Augustin (Mindanao, Philippine Islands) and the most northerly island of the Nanusa (Nanoesa) group (Netherlands East Indies).

The origin of the dispute is to be found in the visit paid to the Island of Palmas (or Miangas) on January 21, 1906, by General Leonard Wood, who was then Governor of the Province of Moro. It is true that according to information contained in the counter-memorandum of the United States the same General Wood had already visited the island "about the year 1903," but as this previous visit appears to have had no results, and it seems even doubtful whether it took place, that of January 21, 1906 is to be regarded as the first entry into contact by the American authorities with the island. The report of General Wood to the Military Secretary, United States Army, dated January 26, 1906, and the certificate delivered on January 21st by First Lieutenant Gordon Johnston to the native interrogated by the controller of the Sangi (Sanghi) and Talauer (Talaut) Islands clearly show that the visit of January 21st relates to the island in dispute.

This visit led to the statement that the Island of Palmas (or Miangas), undoubtedly included in the "archipelago known as the Philippine Islands," as delimited by Article III of the treaty of peace between the United States and Spain, dated December 10, 1898 [30 Stat. 1754], (hereinafter also called

Treaty of Paris) and ceded in virtue of the said article to the United States, was considered by the Netherlands as forming part of the territory of their possessions in the East Indies. There followed a diplomatic correspondence, beginning on March 31, 1906, and leading up to the conclusion of the special agreement of January 23, 1925. . . .

[The sole Arbitrator's summary of the arguments, and his remarks on sovereignty in relation to territory, are omitted.]

Titles of acquisition of territorial sovereignty in present-day international law are either based on an act of effective apprehension, such as occupation or conquest, or, like cession, presuppose that the ceding and the cessionary Power or at least one of them, have the faculty of effectively disposing of the ceded territory. In the same way natural accretion can only be conceived of as an accretion to a portion of territory where there exists an actual sovereignty capable of extending to a spot which falls within its sphere of activity. It seems therefore natural that an element which is essential for the constitution of sovereignty should not be lacking in its continuation. So true is this, that practice, as well as doctrine, recognizes—though under different legal formulae and with certain differences as to the conditions required—that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other states) is as good as a title. The growing insistence with which international law, ever since the middle of the eighteenth century, has demanded that the occupation shall be effective would be inconceivable, if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right. If the effectiveness has above all been insisted on in regard to occupation, this is because the question rarely arises in connection with territories in which there is already an established order of things. Just as before the rise of international law, boundaries of lands were necessarily determined by the fact that the power of a state was exercised within them, so too, under the reign of international law, the fact of peaceful and continuous display is still one of the most important considerations in establishing boundaries between states.

Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a state. This right has as corollary a duty: the obligation to protect within the territory the rights of other states, in particular their right to integrity and inviolability in peace and in war, together with the rights which each state may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the state cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, *i.e.*, to excluding the activities of other states; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.

Although municipal law, thanks to its complete judicial system, is able to recognize abstract rights of property as existing apart from any material display of them, it has none the less limited their effect by the principles of prescription and the protection of possession. International law, the structure of which is not based on any super-state organization, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations.

The principle that continuous and peaceful display of the functions of state within a given region is a constituent element of territorial sovereignty is not only based on the conditions of the formation of independent states and their boundaries (as shown by the experience of political history) as well as on an international jurisprudence and doctrine widely accepted; this principle has further been recognized in more than one federal state, where a jurisdiction is established in order to apply, as need arises, rules of international law to the interstate relations of the states members. This is the more significant, in that it might well be conceived that in a federal state possessing a complete judicial system for interstate matters—far more than in the domain of international relations properly so-called—there should be applied to territorial questions the principle that, failing any specific provision of law to the contrary, a *jus in re* once lawfully acquired shall prevail over *de facto* possession however well established.

It may suffice to quote among several non-dissimilar decisions of the Supreme Court of the United States of America, that in the case of the State of Indiana *v.* State of Kentucky (136 U. S. 479) 1890, where the precedent of the case of Rhode Island *v.* Massachusetts (4 How. 591, 639) is supported by quotations from Vattel and Wheaton, who both admit prescription founded on length of time as a valid and incontestable title.

Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is uncontestedly displayed or again regions accessible from, for instance, the high seas. It is true that neighboring states may by convention fix limits to their own sovereignty, even in regions such as the interior of scarcely explored continents where such sovereignty is scarcely manifested, and in this way each may prevent the other from any penetration of its territory. The delimitation of hinterland may also be mentioned in this connection.

If, however, no conventional line of sufficient topographical precision

exists or if there are gaps in the frontiers otherwise established, or if a conventional line leaves room for doubt, or if, as *e.g.*, in the case of an island situated in the high seas, the question arises whether a title is valid, *erga omnes*, the actual continuous and peaceful display of state functions is in case of dispute the sound and natural criterium of territorial sovereignty. . . .

[The Arbitrator's examination of the admissibility of certain evidence is omitted.]

III. The title alleged by the United States of America as constituting the immediate foundation of its claim is that of cession, brought about by the Treaty of Paris, which cession transferred all rights of sovereignty which Spain may have possessed in the region indicated in Article III of the said treaty and therefore also those concerning the Island of Palmas (or Miangas).

It is evident that Spain could not transfer more rights than she herself possessed. This principle of law is expressly recognized in a letter dated April 7, 1900, from the Secretary of State of the United States to the Spanish Minister at Washington concerning a divergence of opinion which arose about the question whether two islands claimed by Spain as Spanish territory and lying just outside the limits traced by the Treaty of Paris were to be considered as included in, or excluded from the cession. This letter, reproduced in the explanations of the United States Government, contains the following passage:

The metes and bounds defined in the treaty were not understood by either party to limit or extend Spain's right of cession. Were any island within those described bounds ascertained to belong in fact to Japan, China, Great Britain, or Holland, the United States could derive no valid title from its ostensible inclusion in the Spanish cession. The compact upon which the United States negotiators insisted was that all Spanish title to the archipelago known as the Philippine Islands should pass to the United States—no less or more than Spain's actual holdings therein, but all. This Government must consequently hold that the only competent and equitable test of fact by which the title to a disputed cession in that quarter may be determined is simply this: "Was it Spain's to give? If valid title belonged to Spain, it passed; if Spain had no valid title, she could convey none. . . ."

The essential point is therefore whether the island of Palmas (or Miangas) at the moment of the conclusion and coming into force of the Treaty of Paris formed a part of the Spanish or Netherlands territory. The United States declares that Palmas (or Miangas) was Spanish territory and denies the existence of Dutch sovereignty; the Netherlands maintain the existence of their sovereignty and deny that of Spain. . . .

It is admitted by both sides that international law underwent profound

modifications between the end of the Middle Ages and the end of the nineteenth century, as regards the rights of discovery and acquisition of uninhabited regions or regions inhabited by savages or semi-civilized peoples. Both parties are also agreed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled. The effect of discovery by Spain is therefore to be determined by the rules of international law in force in the first half of the sixteenth century—or (to take the earliest date) in the first quarter of it, *i.e.*, at the time when the Portuguese or Spaniards made their appearance in the Sea of Celebes.

If the view most favorable to the American arguments is adopted—with every reservation as to the soundness of such view—that is to say, if we consider as positive law at the period in question the rule that discovery as such, *i.e.*, the mere fact of seeing land, without any act, even symbolical, of taking possession, involved *ipso jure* territorial sovereignty and not merely an “inchoate title,” a *jus ad rem*, to be completed eventually by an actual and durable taking of possession within a reasonable time, the question arises whether sovereignty yet existed at the critical date, *i.e.*, the moment of conclusion and coming into force of the Treaty of Paris.

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law. International law in the nineteenth century, having regard to the fact that most parts of the globe were under the sovereignty of states members of the community of nations, and that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the middle of the eighteenth century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other states and their nationals. It seems therefore incompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty of a state, nor without a master, but which are reserved for the exclusive influence of one state, in virtue solely of a title of acquisition which is no longer recognized by existing law, even if such a title ever conferred territorial sovereignty. For these reasons, discovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty over the Island of Palmas (or Miangas); and in so far as there is no sovereignty, the question of an aban-

donment properly speaking of sovereignty by one state in order that the sovereignty of another may take its place does not arise.

If on the other hand the view is adopted that discovery does not create a definitive title of sovereignty, but only an "inchoate" title, such a title exists, it is true, without external manifestation. However, according to the view that has prevailed at any rate since the nineteenth century, an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered. This principle must be applied in the present case, for the reasons given above in regard to the rules determining which of successive legal systems is to be applied (the so-called intertemporal law). Now, no act of occupation nor, except as to a recent period, any exercise of sovereignty at Palmas by Spain has been alleged. But even admitting that the Spanish title still existed as inchoate in 1898 and must be considered as included in the cession under Article III of the Treaty of Paris, an inchoate title could not prevail over the continuous and peaceful display of authority by another state; for such display may prevail even over a prior, definitive title put forward by another state. . . .

[The examination of the arguments and the whole of Part IV of the award, dealing with the powers of the East India Company and the identity of the Island, are omitted.]

V. The conclusions to be derived from the above examination of the arguments of the parties are the following:

The claim of the United States to sovereignty over the Island of Palmas (or Miangas) is derived from Spain by way of cession under the Treaty of Paris. The latter treaty, though it comprises the island in dispute within the limits of cession, and in spite of the absence of any reserves or protest by the Netherlands as to these limits, has not created in favor of the United States any title of sovereignty such as was not already vested in Spain. The essential point is therefore to decide whether Spain had sovereignty over Palmas (or Miangas) at the time of the coming into force of the Treaty of Paris.

The United States base their claim on the titles of discovery, or recognition by treaty and of contiguity, *i.e.*, titles relating to acts or circumstances leading to the acquisition of sovereignty; they have however not established the fact that sovereignty so acquired was effectively displayed at any time.

The Netherlands on the contrary found their claim to sovereignty essentially on the title of peaceful and continuous display of state authority over the island. Since this title would in international law prevail over a title of acquisition of sovereignty not followed by actual display of state authority, it is necessary to ascertain in the first place, whether the contention of the Netherlands is sufficiently established by evidence, and, if so, for what period of time.

In the opinion of the arbitrator the Netherlands have succeeded in establishing the following facts:

a. The island of Palmas (or Miangas) is identical with an island designated by this or a similar name, which has formed, at least since 1700, successively a part of two of the native states of the Island of Sangi (Talaute Isles).

b. These native states were from 1677 onwards connected with the East India Company, and thereby with the Netherlands, by contracts of suzerainty, which conferred upon the suzerain such powers as would justify his considering the vassal state as a part of his territory.

c. Acts characteristic of state authority exercised either by the vassal state or by the suzerain Power in regard precisely to the Island of Palmas (or Miangas) have been established as occurring at different epochs between 1700 and 1898, as well as in the period between 1898 and 1906.

The acts of indirect or direct display of Netherlands sovereignty at Palmas (or Miangas), especially in the eighteenth and early nineteenth centuries are not numerous, and there are considerable gaps in the evidence of continuous display. But apart from the consideration that the manifestations of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent, it is not necessary that the display of sovereignty should go back to a very far distant period. It may suffice that such display existed in 1898, and had already existed as continuous and peaceful before that date long enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights.

It is not necessary that the display of sovereignty should be established as having begun at a precise epoch; it suffices that it had existed at the critical period preceding the year 1898. It is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of state control. This is particularly the case, if sovereignty is acquired by the establishment of the suzerainty of a colonial power over a native state, and in regard to outlying possessions of such a vassal state.

Now the evidence relating to the period after the middle of the nineteenth century makes it clear that the Netherlands Indian Government considered the island distinctly as a part of its possessions and that, in the years immediately preceding 1898, an intensification of display of sovereignty took place.

Since the moment when the Spaniards, in withdrawing from the Moluccas in 1666, made express reservations as to the maintenance of their

sovereign rights, up to the contestation made by the United States in 1906, no contestation or other action whatever or protest against the exercise of territorial rights by the Netherlands over the Talautse (Sangi) Isles and their dependencies (Miangas included) has been recorded. The peaceful character of the display of Netherlands sovereignty for the entire period to which the evidence concerning acts of display relates (1700-1906) must be admitted.

There is moreover no evidence which would establish any act of display of sovereignty over the island by Spain or another Power, such as might counterbalance or annihilate the manifestations of Netherlands sovereignty. As to third Powers, the evidence submitted to the tribunal does not disclose any trace of such action, at least from the middle of the seventeenth century onwards. These circumstances, together with the absence of any evidence of a conflict between Spanish and Netherlands authorities during more than two centuries as regards Palmas (or Miangas), are an indirect proof of the exclusive display of Netherlands sovereignty.

This being so, it remains to be considered first whether the display of state authority might not be legally defective and therefore unable to create a valid title of sovereignty, and secondly whether the United States may not put forward a better title to that of the Netherlands.

As to the conditions of acquisition of sovereignty by way of continuous and peaceful display of state authority (so-called prescription), some of which have been discussed in the United States counter memorandum, the following must be said:

The display has been open and public, that is to say that it was in conformity with usages as to exercise of sovereignty over colonial states. A clandestine exercise of state authority over an inhabited territory during a considerable length of time would seem to be impossible. An obligation for the Netherlands to notify to other Powers the establishment of suzerainty over the Sangi States or of the display of sovereignty in these territories did not exist.

Such notification, like any other formal act, can only be the condition of legality as a consequence of an explicit rule of law. A rule of this kind adopted by the Powers in 1885 for the African continent does not apply *de plano* to other regions, and thus the contract with Taruna of 1885, or with Kandahar-Taruna of 1889, even if they were to be considered as the first assertions of sovereignty over Palmas (or Miangas) would not be subject to the rule of notification.

There can further be no doubt that the Netherlands exercised the state authority over the Sangi States as sovereign in their own right, not under a derived or precarious title.

Finally it is to be observed that the question whether the establishment

of the Dutch on the Talautse Isles (Sangi) in 1677 was a violation of the Treaty of Münster and whether this circumstance might have prevented the acquisition of sovereignty even by means of prolonged exercise of state authority, need not be examined, since the Treaty of Utrecht recognized the state of things existing in 1714 and therefore the suzerain right of the Netherlands over Tabukan and Miangas.

The conditions of acquisition of sovereignty by the Netherlands are therefore to be considered as fulfilled. It remains now to be seen whether the United States as successors of Spain are in a position to bring forward an equivalent or stronger title. This is to be answered in the negative.

The title of discovery, if it had not been already disposed of by the Treaties of Münster and Utrecht would, under the most favorable and most extensive interpretation, exist only as an inchoate title, as a claim to establish sovereignty by effective occupation. An inchoate title however cannot prevail over a definite title founded on continuous and peaceful display of sovereignty . . .

The Netherlands title of sovereignty, acquired by continuous and peaceful display of state authority during a long period of time going probably back beyond the year 1700, therefore holds good . . .

Supposing that, at the time of the coming into force of the Treaty of Paris, the Island of Palmas (or Miangas) did not form part of the territory of any state, Spain would have been able to cede only the rights which she might possibly derive from discovery or contiguity. On the other hand, the inchoate title of the Netherlands could not have been modified by a treaty concluded between third Powers; and such a treaty could not have impressed the character of illegality on any act undertaken by the Netherlands with a view to completing their inchoate title—at least as long as no dispute on the matter had arisen, *i.e.*, until 1906.

Now it appears from the report on the visit of General Wood to Palmas (or Miangas), on January 21, 1906, that the establishment of Netherlands authority, attested also by external signs of sovereignty, had already reached such a degree of development, that the importance of maintaining this state of things ought to be considered as prevailing over a claim possibly based either on discovery in very distant times and unsupported by occupation, or on mere geographical position.

This is the conclusion reached on the ground of the relative strength of the titles invoked by each party, and founded exclusively on a limited part of the evidence concerning the epoch immediately preceding the rise of the dispute.

This same conclusion must impose itself with still greater force if there be taken into consideration—as the arbitrator considers should be done—all the evidence which tends to show that there were unchallenged acts of

peaceful display of Netherlands sovereignty in the period from 1700 to 1906, and which—as has been stated above—may be regarded as sufficiently proving the existence of Netherlands sovereignty.

For these reasons the arbitrator, in conformity with Article I of the special agreement of January 23, 1925 decides that: the Island of Palmas (or Miangas) forms in its entirety a part of Netherlands territory.

Done at The Hague, this fourth day of April, 1928.

MAX HUBER

Arbitrator

MICHIELS VAN VERDUYNEN

Secretary General

§ 43a. PRESCRIPTION. ABANDONMENT

NOTE BY THE EDITOR

The award in the *Island of Palmas* case may be regarded as based on *prescription*, i.e., effective unchallenged possession by the Netherlands over a considerable period, though of a territory the original legal title to which (although inchoate) was in Spain by discovery. Likewise, the failure of Spain to follow up its discovery by further acts may be regarded as presumed *abandonment* of its inchoate title.

Wheaton says:

The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called *prescription*, is justly applicable, as between nation and nation; but the constant and approved practice of nations shows that, by whatever name it may be called, the uninterrupted possession of territory, or other property, for a certain length of time, by one State, excludes the claim of every other; in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question. This rule is founded on the supposition, confirmed by constant experience, that every person will naturally seek to enjoy that which belongs to him; and the inference fairly to be drawn, from his silence and neglect, of the original defect of his title, or his intent to relinquish it.¹

There is no definite length of time required by international law during which prescription must run in order to bar another title, though a treaty may prescribe such a time. Thus a treaty for the settlement of a boundary dispute between Great Britain and Venezuela, stated that "adverse holding or prescription during a period of fifty years shall make a good title."²

¹ Henry Wheaton, *Elements of International Law*, Edition of 1866 by R. H. Dana, Jr., edited by G. G. Wilson (1936), p. 164.

² Moore, *Digest*, I, § 88, 297.

The other side of the principle of prescription is the principle of abandonment. It has been said that

Just as occupation requires, first, the actual taking into possession (*corpus*) of a territory and secondly, the intention (*animus*) to acquire sovereignty over it, so dereliction [abandonment] requires first, actual abandonment of a territory, and, secondly, the intention to give up sovereignty over it. Actual abandonment alone does not involve dereliction as long as it must be presumed that the owner has the will and ability to retake possession of the territory. . . . It is only when a territory is really derelict that any State may acquire it through occupation.³

It thus appears that whenever a prescriptive title is to be held good in law against a previous legal title, the intent to abandon must be presumed. This appears to have been the position of the award in the Palmas case.

§ 44. ACQUISITION BY CONQUEST

Fleming and Marshall v. Page

SUPREME COURT OF THE UNITED STATES, 1850

9 Howard (U. S.) 603.

Certificate of division of opinion by the judges of the circuit court of the United States for the eastern district of Pennsylvania.

The question was as follows:—

"Whether Tampico, in the year 1847, while in the military occupation of the forces of the United States, ceased to be a foreign country, within the meaning of the first section of the act of Congress passed 30th July, 1846, entitled: 'An act reducing the duty on imports, and for other purposes;' so that goods, wares, and merchandise of the produce, growth, and manufacture of Mexico, or any part thereof, imported into the port of Philadelphia from Tampico, during said military occupation, were not subject to the payment of the duties prescribed by the said act, but entitled to be entered free of duty as from a domestic port."

[Argument of Counsel omitted.]

TANEY, C. J.: . . . The question certified by the circuit court turns upon the construction of the act of Congress of July 30, 1846. The duties levied upon the cargo of the schooner Catharine were the duties imposed by this law upon goods imported from a foreign country. And if at the time of this shipment, Tampico was not a foreign port within the meaning of the act of congress, then the duties were illegally charged, and, having been paid under protest, the plaintiffs would be entitled to recover in this action the amount exacted by the collector.

³ Oppenheim, *International Law*, 4th Ed., I, 472-473.

The port of Tampico, at which the goods were shipped, and the Mexican State of Tamaulipas, in which it is situated, were undoubtedly at the time of the shipment, subject to the sovereignty and dominion of the United States. The Mexican authorities had been driven out, or had submitted to our army and navy; and the country was in the exclusive and firm possession of the United States, and governed by its military authorities, acting under the orders of the President. But it does not follow that it was a part of the United States, or that it ceased to be a foreign country, in the sense in which these words are used in the acts of congress.

The Country in question had been conquered in war. But the genius and character of our institutions are peaceful, and the power to declare war was not conferred upon congress for the purposes of aggression or aggrandizement, but to enable the general government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens.

A war, therefore, declared by congress, can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war, imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country. The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.

It is true, that, when Tampico had been captured, and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possession continued, as the territory of the United States, and to respect it as such. For, by the laws and usages of nations, conquest is a valid title, while the victor maintains the exclusive possession of the conquered country. The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. As regarded all

other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries.

But yet it was not a part of this Union. For every nation which acquires territory by treaty or conquest, holds it according to its own institutions and laws. And the relation in which the port of Tampico stood to the United States, while it was occupied by their arms, did not depend upon the laws of nations, but upon our own constitution and acts of congress. The power of the President, under which Tampico and the State of Tamaulipas were conquered and held in subjection, was simply that of a military commander prosecuting a war waged against a public enemy by the authority of his government. And the country from which these goods were imported, was invaded and subdued, and occupied as the territory of a foreign hostile nation, as a portion of Mexico, and was held in possession in order to distress and harass the enemy. While it was occupied by our own troops, they were in an enemy's country, and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy, when he surrenders to a force which he is unable to resist. But the boundaries of the United States, as they existed when war was declared against Mexico, were not extended by the conquest; nor could they be regulated by the varying incidents of war, and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place which was out of the limits of the United States, as previously established by the political authorities of the government, was still foreign; nor did our laws extend over it. Tampico was, therefore, a foreign port when this shipment was made. . . .

We are entirely satisfied that, under the Constitution and laws of the United States, Tampico was a foreign port, within the meaning of the act of 1846, when these goods were shipped, and that the cargoes were liable to the duty charged upon them. And we shall certify accordingly to the Circuit Court.

McLean, J., dissented.

§ 45. ACCRETION

The Anna

GREAT BRITAIN, HIGH COURT OF ADMIRALTY, 1805

5 C. Robinson 373.

This was the case of a ship under American colours, with a cargo of logwood, and about 13,000 dollars on board, bound from the Spanish main

to New Orleans, and captured by the "Minerva" privateer near the mouth of the River Mississippi. A claim was given under the direction of the American ambassador for the ship and cargo, "as taken within the territory of the United States, at the distance of a mile and a half from the western shore of the principal entrance of the Mississippi, and within view of a post protected by a gun, and where is stationed an officer of the United States."

[The arguments of counsel and part of the opinion are omitted.]

SIR W. SCOTT: . . . When the ship was brought into this country, a claim was given of a grave nature, alleging a violation of the territory of the United States of America. This great leading fact has very properly been made a matter of much discussion, and charts have been laid before the Court to shew the place of capture, though with different representations from the adverse parties. The capture was made, it seems, at the mouth of the River Mississippi, and, as it is contended in the claim, within the boundaries of the United States. We all know that the rule of law on this subject is "*terræ dominium finitur, ubi finitur armorum vis*," and since the introduction of fire-arms, that distance has usually been recognised to be about three miles from the shore. But it so happens in this case, that a question arises as to what is to be deemed the shore, since there are a number of little mud islands composed of earth and trees drifted down by the river, which form a kind of portico to the mainland. It is contended that these are not to be considered as any part of the territory of America, that they are a sort of "*no man's land*," not of consistency enough to support the purposes of life, uninhabited, and resorted to, only, for shooting and taking birds' nests. It is argued that the line of territory is to be taken only from the Balise, which is a fort raised on made land by the former Spanish possessors. I am of a different opinion; I think that the protection of territory is to be reckoned from these islands; and that they are the natural appendages of the coast on which they border, and from which indeed they are formed. Their elements are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the books of law, *Quod vis fluminis de tuo prædio detraxerit, & vicino prædio attulerit, palam tuum remanet*, even if it had been carried over to an adjoining territory. Consider what the consequence would be if lands of this description were not considered as appendant to the mainland, and as comprised within the bounds of territory. If they do not belong to the United States of America, any other power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of America! It is physically possible at least that they might be so occupied by European nations, and then the command of the river would be no longer in America, but in such settlements. The possibility of such

a consequence is enough to expose the fallacy of any arguments that are addressed to shew, that these islands are not to be considered as part of the territory of America. Whether they are composed of earth or solid rock, will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil.

I am of opinion that the right of territory is to be reckoned from those islands. That being established, it is not denied that the actual capture took place within the distance of three miles from the islands, and at the very threshold of the river. . . .

The conduct of the captors has on all points been highly reprehensible. Looking at all the circumstances of previous misconduct, I feel myself bound to pronounce, that there has been a violation of territory, and that as to the question of property, there was not sufficient ground of seizure; and that these acts of misconduct have been further aggravated, by bringing the vessel to England, without any necessity that can justify such a measure. In such a case it would be falling short of the justice due to the violated rights of America and to the individuals who have sustained injury by such misconduct, if I did not follow up the restitution which has passed on the former day, with a decree of costs and damages.

§ 46. ACQUISITION BY TREATY: CESSION

Treaty Between the United States and the French Republic, April 30, 1803, for the Cession of Louisiana ¹

Hunter Miller, *Treaties and Other International Acts of The United States of America*, II, 498-515.

The President of the United States of America and the First Consul of the French Republic in the name of the French People desiring to remove all Source of misunderstanding relative to objects of discussion mentioned in the Second and fifth articles of the Convention of the 8th Vendémiaire an 9/30 September 1800 relative to the rights claimed by the United States in virtue of the Treaty concluded at Madrid the 27 of October 1795, between His Catholic Majesty, & the Said United States, & willing to

¹ Submitted to the Senate, October 17, 1803. Resolution of advice and consent, October 20, 1803. Ratified by the United States, October 21, 1803. Ratified by France, May 22, 1803. Ratifications exchanged at Washington, October 21, 1803. Proclaimed, October 21, 1803.

NOTE: Miller says, "This treaty and the two conventions of the same date . . . formed together one transaction; they were concurrently signed, and by the express terms of Article 9 of the treaty their ratifications were interdependent and were concurrently exchanged." *Treaties*, etc., II, 505. Of these two treaties one (printed in Miller as Document 28, pp. 512 ff.) is a *Convention for the Payment of Sixty Million Francs (\$11,250,000) by the United States*; the other (printed in Miller as No. 30, pp. 516 ff.) is a *Convention for the Payment of Sums Due by France to Citizens of the United States*. The cession may also be viewed as a sale, and as a part of a more general settlement.

Strengthen [*sic*] the union and friendship which at the time of the Said Convention was happily reestablished between the two nations have respectively named their Plenipotentiaries to wit The President of the United States, by and with the advice and consent of the Senate of the Said States; Robert R. Livingston Minister Plenipotentiary of the United States and James Monroe Minister Plenipotentiary and Envoy extraordinary of the Said States near the Government of the French Republic; And the First Consul in the name of the French people, Citizen Francis Barbé Marbois Minister of the public treasury who after having respectively exchanged their full powers have agreed to the following Articles.

ARTICLE I

Whereas by the Article the third of the Treaty concluded at S^t Idelfonso the 9th Vendémiaire an 9/1st October 1800 between the First Consul of the French Republic and his Catholic Majesty it was agreed as follows.

"His Catholic Majesty promises and engages on his part to cede to the "French Republic six months after the full and entire execution of the "conditions and Stipulations herein relative to his Royal Highness the "Duke of Parma, the Colony or Province of Louisiana with the Same "extent that it now has in the hands of Spain, & that it had when France "possessed it; and Such as it should be after the Treaties subsequently "[*sic*] entered into between Spain and other States."

And whereas in pursuance of the Treaty and particularly of the third article the French Republic has an incontestible title to the domain and to the possession of the said Territory—The First Consul of the French Republic desiring to give to the United States a strong proof of his friendship doth hereby cede to the said United States in the name of the French Republic for ever and in full Sovereignty the said territory with all its rights and appurtenances as fully and in the Same manner as they have been acquired by the French Republic in virtue of the above mentioned Treaty concluded with his Catholic Majesty.

ART: II

In the cession made by the preceding article are included the adjacent Islands belonging to Louisiana all public lots and Squares, vacant lands and all public buildings, fortifications, barracks and other edifices which are not private property.—The Archives, papers & documents relative to the domain and Sovereignty of Louisiana and its dependances will be left in the possession of the Commissaries of the United States, and copies will be afterwards given in due form to the Magistrates and Municipal officers of Such of the said papers and documents as may be necessary to them.

ART: III

The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible according to the principles of the federal Constitution to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property and the Religion which they profess.

ART: IV

There Shall be Sent by the Government of France a Commissary to Louisiana to the end that he do every act necessary as well to receive from the Officers of his Catholic Majesty the Said country and its dependances in the name of the French Republic if it has not been already done as to transmit it in the name of the French Republic to the Commissary or agent of the United States.

ART: V

Immediately after the ratification of the present Treaty by the President of the United States and in case that of the first Consul's shall have been previously obtained, the Commissary of the French Republic shall remit all military posts of New Orleans and other parts of the ceded territory to the Commissary or Commissaries named by the President to take possession—the troops whether of France or Spain who may be there shall cease to occupy any military post from the time of taking possession and shall be embarked as soon as possible in the course of three months after the ratification of this treaty.

ART: VI

The United States promise to execute Such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians until by mutual consent of the United States and the said tribes or nations other Suitable articles Shall have been agreed upon.

ART: VII

As it is reciprocally advantageous to the commerce of France and the United States to encourage the communication of both nations for a limited time in the country ceded by the present treaty until general arrangements relative to the commerce of both nations may be agreed on; it has been agreed between the contracting parties that the French Ships coming directly from France or any of her colonies loaded only with the produce and manufactures of France or her Said Colonies; and the Ships of Spain

coming directly from Spain or any of her colonies loaded only with the produce or manufactures of Spain or her Colonies Shall be admitted during the Space of twelve years in in [*sic*] the Port of New-Orleans and in all other legal ports-of-entry within the ceded territory in the Same manner as the Ships of the United States coming directly from France or Spain or any of their Colonies without being Subject to any other or greater duty on merchandize or other or greater tonnage than that paid by the citizens of the United States.

During the Space of time above mentioned no other nation Shall have a right to the Same privileges in the Ports of the ceded territory—the twelve years Shall commence three months after the exchange of ratifications if it Shall take place in France or three months after it Shall have been notified at Paris to the French Government if it Shall take place in the United States; It is however well understood that the object of the above article is to favour the manufactures, Commerce, freight and navigation of France and of Spain So far as relates to the importations that the french and Spanish Shall make into the Said Ports of the United States without in any Sort affecting the regulations that the United States may make concerning the exportation of the produce and merchandize of the United States, or any right they may have to make Such regulations.

ART: VIII

In future and for ever after the expiration of the twelve years, the Ships of France shall be treated upon the footing of the most favoured nations in the ports above mentioned.

ART: IX

The particular Convention Signed this day by the respective Ministers having for its object to provide for the payment of debts due to the Citizens of the United States by the French Republic prior to the 30th Sept^r 1800 (8th Vendémiaire an 9) is approved and to have its execution in the Same manner as if it had been inserted in this present treaty and it Shall be ratified in the Same form and in the Same time So that the one Shall not be ratified distinct from the other.

Another particular Convention Signed at the Same date as the present treaty relative to a definitive rule between the contracting parties is in the like manner approved and will be ratified in the Same form, and in the Same time and jointly.

ART: X

The present treaty Shall be ratified in good and due form and the ratifications Shall be exchanged in the Space of Six months after the date of the Signature by the Ministers Plenipotentiary or Sooner if possible.

In faith whereof the respective Plenipotentiaries have Signed these articles in the French and English languages; declaring nevertheless that the present Treaty was originally agreed to in the French language; and have thereunto affixed their Seals.

Done at Paris the tenth day of Floreal in the eleventh year of the French Republic; and the 30th of April 1803

ROBT R. LIVINGSTON

[Seal]

JAS MONROE

[Seal]

BARBÉ MARBOIS

[Seal]

B. Illustrations of the Relation of Territory to Jurisdiction

§ 47. THE TERRITORIAL CHARACTER OF LAW

American Banana Company v. United Fruit Company

SUPREME COURT OF THE UNITED STATES, 1909

213 U. S. 347.

Mr. Justice Holmes delivered the opinion of the court.

This is an action brought to recover threefold damages under the Act to Protect Trade against Monopolies. July 2, 1890, c. 647, Sec. 7. 26 Stat. 209, 210. . . . The case was . . . brought to this Court by writ of error.

The allegations of the complaint may be summed up as follows: The plaintiff is an Alabama corporation, organized in 1904. The defendant is a New Jersey corporation, organized in 1899. Long before the plaintiff was formed, the defendant, with intent to prevent competition and to control and monopolize the banana trade, bought the property and business of several of its previous competitors, with provision against their resuming the trade, made contracts with others, including a majority of the most important, regulating the quantity to be purchased and the price to be paid, and acquired a controlling amount of stock in still others. For the same purpose it organized a selling company, of which it held the stock, that by agreement sold at fixed prices all the bananas of the combining parties. By this and other means it did monopolize and restrain the trade and maintained unreasonable prices. The defendant being in this ominous attitude, one McConnell in 1903 started a banana plantation in Panama, then

part of the United States of Colombia, and began to build a railway (which would afford his only means of export), both in accordance with the laws of the United States of Colombia. He was notified by the defendant that he must either combine or stop. Two months later, it is believed at the defendant's instigation, the governor of Panama recommended to his national government that Costa Rica be allowed to administer the territory through which the railroad was to run, and this although that territory had been awarded to Colombia under an arbitration agreed to by treaty. The defendant, and afterwards, in September, the government of Costa Rica, it is believed by the inducement of the defendant, interfered with McConnell. In November, 1903, Panama revolted and became an independent republic, declaring its boundary to be that settled by the award. In June, 1904, the plaintiff bought out McConnell and went on with the work, as it had a right to do under the laws of Panama. But in July, Costa Rican soldiers and officials, instigated by the defendant, seized a part of the plantation and a cargo of supplies and have held them ever since, and stopped the construction and operation of the plantation and railway. In August, one Astua, by *ex parte* proceedings, got a judgment from a Costa Rican court, declaring the plantation to be his, although, it is alleged, the proceedings were not within the jurisdiction of Costa Rica, and were contrary to its laws and void. Agents of the defendants then bought the lands from Astua. The plaintiff has tried to induce the government of Costa Rica to withdraw its soldiers and also has tried to persuade the United States to interfere, but has been thwarted in both by the defendant and has failed. The government of Costa Rica remained in possession down to the bringing of the suit.

As a result of the defendant's acts the plaintiff has been deprived of the use of the plantation, and the railway, the plantation and supplies have been injured. The defendant also, by outbidding, has driven purchasers out of the market and has compelled producers to come to its terms, and it has prevented the plaintiff from buying for export and sale. This is the substantial damage alleged. There is thrown in a further allegation that the defendant has "sought to injure" the plaintiff's business by offering positions to its employes and by discharging and threatening to discharge persons in its own employ who were stockholders of the plaintiff. But no particular point is made of this. It is contended, however, that even if the main argument fails and the defendant is held not to be answerable for acts depending on the cooperation of the government of Costa Rica for their effect, a wrongful conspiracy resulting in driving the plaintiff out of business is to be gathered from the complaint and that it was entitled to go to trial upon that.

It is obvious that, however stated, the plaintiff's case depends on several

rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other States. It is surprising to hear it argued that they were governed by the act of Congress.

No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive. See *The Hamilton*, 207 U. S. 398, 403; *Hart v. Gumpach*, L. R. 4 P. C. 439, 463, 464; *British South Africa Co. v. Companhia de Mocambique* [1893], A. C. 602. They go further, at times, and declare that they will punish any one, subject or not, who shall do certain things, if they can catch him, as in the case of pirates on the high seas. In cases immediately affecting national interests they may go further still and may make, and, if they get the chance, execute similar threats as to acts done within another recognized jurisdiction. An illustration from our statutes is found with regard to criminal correspondence with foreign governments. Rev. Stat., § 5335. See further *Commonwealth v. Macloon*, 101 Massachusetts, 1; *The Sussex Peerage*, 11 Cl. & Fin. 85, 146. And the notion that English statutes bind British subjects everywhere has found expression in modern times and has had some startling applications. *Rex v. Sawyer*, 2 C. & K. 101; *The Zollverein*, Swabey, 96, 98. But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. *Slater v. Mexican National R. R. Co.*, 194 U. S. 120, 126. This principle was carried to an extreme in *Milliken v. Pratt*, 125 Massachusetts, 374. For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent. *Phillips v. Eyre*, L. R. 4 Q. B. 225, 239; L. R. 6 Q. B. 1, 28; Dicey, *Conflict of Laws* (2d ed.), 647. See also Appendix, 724, 726, Note 2, *ibid.*

Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts. But the word commonly is confined to such prophecies or threats when addressed to persons living within the power of the courts. A threat that depends upon the choice of the party affected to bring himself within that power hardly would be called law in the ordinary sense. We do not speak of blockade running by neutrals as unlawful. And the usages of speech correspond to the limit of the attempts of the lawmaker, except in extraordinary cases. It is true that domestic corporations remain always within the power of the domestic law, but in the

present case, at least, there is no ground for distinguishing between corporations and men.

The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. "All legislation is *prima facie* territorial." *Ex parte Blain In re Sawers*, 12 Ch. Div. 522, 528; *State v. Carter*, 27 N. J. (3 Dutcher) 499; *People v. Merrill*, 2 Parker, Crim. Rep. 590, 596. Words having universal scope, such as "every contract in restraint of trade," "Every person who shall monopolize," etc., will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch. In the case of the present statute the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue. We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned. Other objections of a serious nature are urged but need not be discussed. . . .

*Judgment affirmed.*¹

§ 48. JURISDICTION WITH RESPECT TO CRIME

The following Draft Convention, like the others drawn up by the Harvard Law School Research in International Law, is not binding upon States. The character of the Draft Convention may be further illuminated by the following statement from the Introductory Comment of the Reporter (Professor E. D. Dickinson) and his Assistants and Advisers:

"An analysis of modern national codes of penal law and penal procedure, checked against the conclusions of reliable writers and the resolutions of international conferences or learned societies, and supplemented by some exploration of the jurisprudence of national courts, discloses five general principles on which a more or less extensive penal jurisdiction is claimed by States at the present time. These five general principles are: first, the territorial principle, determining jurisdiction by reference to the place where the offence is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offence; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offence; fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offence; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality or

¹ But where there is a conspiracy to restrain interstate and foreign commerce entered into in the United States and made effective by acts done therein, the courts will take jurisdiction, even though acts essential to effecting the conspiracy take place wholly within the jurisdiction of a foreign State. *United States v. Sisal Sales Corporation* (1927) 274 U. S. 268, 47 S. Ct. 592. This case, unlike *American Banana Co. v. United Fruit Co.*, was one in which the government sought an injunction, under the Sherman Act and the Wilson Tariff Act.—Ed.

national character of the person injured by the offence. Of these five principles, the first is everywhere regarded as of primary importance and of fundamental character. The second is universally accepted, though there are striking differences in the extent to which it is used in the different national systems. The third is claimed by most States, regarded with misgivings in a few, and generally ranked as the basis of an auxiliary competence. The fourth is widely though by no means universally accepted as the basis of an auxiliary competence, except for the offence of piracy, with respect to which it is the generally recognized principle of jurisdiction. The fifth, asserted in some form by a considerable number of States and contested by others, is admittedly auxiliary in character and is probably not essential for any State if the ends served are adequately provided for on other principles.

"The plan of the present Convention has been determined primarily by the recognition which must be accorded to the general principles enumerated above. Following Article 1 on the use of terms and Article 2 on the scope of the Convention, Article 3 states the territorial principle in its broadest acceptable terms. Article 4 formulates a similar principle for offences committed on public or private ships or aircraft. Article 5 states the nationality principle in its broadest acceptable terms; and Article 6 formulates a similar principle for offences committed by persons who may be assimilated to nationals for certain purposes or at certain times. The protective principle is incorporated in Article 7 for offences against the security of the state and in Article 8 for offences of counterfeiting. Article 9 states the principle of universality for the offence of piracy; and Article 10 formulates the same principle, in carefully guarded terms, for other crimes. Article 11 incorporates by reference such immunities from the exercise of penal jurisdiction as are accorded by international law or international convention. Articles 12, 13, 14, and 15 incorporate essential safeguards with respect to the prosecution and punishment of aliens. Article 16 forbids the prosecution or punishment of any person of whom custody has been obtained in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated. Article 17 formulates certain general principles of interpretation; and Article 18 provides for the settlement of disputes with respect to the interpretation or application of the Convention. . . .

"The Convention is in one sense an epitome of the results of an investigation which has ranged over a wide field and which is reported at some length in the appended comment. The investigation indicates that States have much more in common with respect to penal jurisdiction than is generally appreciated, that the gulf between those States which stress traditionally the territorial principle and the States which make an extensive use of other principles is by no means so wide as has been generally assumed, that there are practicable bases of compromise, without sacrifice of any essential state interest, on most if not all the controverted questions, and that it is feasible to attempt a definition of penal jurisdiction in a carefully integrated instrument which combines recognition of the jurisdiction asserted by most States in their national legislation and jurisprudence with such limitations and safeguards as may be calculated to make broad definitions of competence acceptable to all. The Convention is submitted as a statement of the penal jurisdiction of States which should have the advantage, for every State, of substituting for the petty conflicts and uncertainties that have caused irritation in the past the security that comes from a common understanding of general principles."—29 *A.J.I.L.* (Supp., July, 1935) 445-447.

Draft Convention On Jurisdiction with Respect to Crime

HARVARD LAW SCHOOL RESEARCH IN INTERNATIONAL LAW

29 *American Journal of International Law* (Supp., July, 1935),
439-442.

ARTICLE I. USE OF TERMS

As the terms are used in this Convention:

- (a) A "State" is a member of the community of nations.
- (b) A State's "jurisdiction" is its competence under international law to prosecute and punish for crime.
- (c) A "crime" is an act or omission which is made an offence by the law of the State assuming jurisdiction.
- (d) A State's "territory" comprises its land and territorial waters and the air above its land and territorial waters.
- (e) A "national" of a State is a natural person upon whom that State has conferred its nationality, or a juristic person upon whom that State has conferred its national character, in conformity with international law.
- (f) An "alien" is a person who is not a national of the State assuming jurisdiction.

ARTICLE 2. SCOPE OF CONVENTION

A State's jurisdiction with respect to crime is defined and limited by this Convention; but nothing in its provisions shall preclude any of the parties to this Convention from entering into other agreements, or from giving effect to other agreements now in force, concerning competence to prosecute and punish for crime, which affect only the parties to such other agreements.

ARTICLE 3. TERRITORIAL JURISDICTION

A State has jurisdiction with respect to any crime committed in whole or in part within its territory.

This jurisdiction extends to

- (a) Any participation outside its territory in a crime committed in whole or in part within its territory; and
- (b) Any attempt outside its territory to commit a crime in whole or in part within its territory.

ARTICLE 4. SHIPS AND AIRCRAFT

A State has jurisdiction with respect to any crime committed in whole or in part upon a public or private ship or aircraft which has its national character.

This jurisdiction extends to

- (a) Any participation outside its territory in a crime committed in whole or in part upon its public or private ship or aircraft; and
- (b) Any attempt outside its territory to commit a crime in whole or in part upon its public or private ship or aircraft.

ARTICLE 5. JURISDICTION OVER NATIONALS

A State has jurisdiction with respect to any crime committed outside its territory,

- (a) By a natural person who was a national of that State when the crime was committed or who is a national of that State when prosecuted or punished; or
- (b) By a corporation or other juristic person which had the national character of that State when the crime was committed.

ARTICLE 6. PERSONS ASSIMILATED TO NATIONALS

A State has jurisdiction with respect to any crime committed outside its territory,

- (a) By an alien in connection with the discharge of a public function which he was engaged to perform for that State; or
- (b) By an alien while engaged as one of the personnel of a ship or aircraft having the national character of that State.

ARTICLE 7. PROTECTION—SECURITY OF THE STATE

A State has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that State, provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed.

ARTICLE 8. PROTECTION—COUNTERFEITING

A State has jurisdiction with respect to any crime committed outside its territory by an alien which consists of a falsification or counterfeiting, or an uttering of falsified copies or counterfeits, of the seals, currency, instruments of credit, stamps, passports, or public documents, issued by that State or under its authority.

ARTICLE 9. UNIVERSALITY—PIRACY

A State has jurisdiction with respect to any crime committed outside its territory by an alien which constitutes piracy by international law.

ARTICLE 10. UNIVERSALITY—OTHER CRIMES

A State has jurisdiction with respect to any crime committed outside its territory by an alien, other than the crimes mentioned in Articles 6, 7, 8 and 9, as follows:

(a) When committed in a place not subject to its authority but subject to the authority of another State, if the act or omission which constitutes the crime is also an offence by the law of the place where it was committed, if surrender of the alien for prosecution has been offered to such other State or States and the offer remains unaccepted, and if prosecution is not barred by lapse of time under the law of the place where the crime was committed. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of the place where the crime was committed.

(b) When committed in a place not subject to the authority of any State, if the act or omission which constitutes the crime is also an offence by the law of a State of which the alien is a national, if surrender of the alien for prosecution has been offered to the State or States of which he is a national and the offer remains unaccepted, and if prosecution is not barred by lapse of time under the law of a State of which the alien is a national. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of a State of which the alien is a national.

(c) When committed in a place not subject to the authority of any State, if the crime was committed to the injury of the State assuming jurisdiction, or of one of its nationals, or of a corporation or juristic person having its national character.

(d) When committed in a place not subject to the authority of any State and the alien is not a national of any State.

ARTICLE 11. IMMUNITIES

In exercising jurisdiction under this Convention, a State shall respect such immunities as are accorded by international law or international convention to other States or to institutions created by international convention.

ARTICLE 12. ALIENS—PROSECUTION AND PUNISHMENT

In exercising jurisdiction under this Convention, no State shall prosecute an alien who has not been taken into custody by its authorities, prevent communication between an alien held for prosecution or punishment and the diplomatic or consular officers of the State of which he is a national, subject an alien held for prosecution or punishment to other than just and humane treatment, prosecute an alien otherwise than by fair trial before an

impartial tribunal and without unreasonable delay, inflict upon an alien any excessive or cruel or unusual punishment, or subject an alien to unfair discrimination.

ARTICLE 13. ALIENS—NON BIS IN IDEM

In exercising jurisdiction under this Convention, no State shall prosecute or punish an alien after it is proved that the alien has been prosecuted in another State for a crime requiring proof of substantially the same acts or omissions and has been acquitted on the merits, or has been convicted and has undergone the penalty imposed, or, having been convicted, has been paroled or pardoned.

ARTICLE 14. ALIENS—ACTS REQUIRED BY LAW

In exercising jurisdiction under this Convention, no State shall prosecute or punish an alien for an act or omission which was required of that alien by the law of the place where the alien was at the time of the act or omission.

ARTICLE 15. ALIENS—ASSISTING ADMINISTRATION OF JUSTICE

In exercising jurisdiction under this Convention, no State shall prosecute or punish an alien during his presence within its territory or a place subject to its authority at the request of officials of that State for the purpose of testifying before State tribunals or otherwise assisting in the administration of justice, except for crimes committed while present for such purpose.

ARTICLE 16. APPREHENSION IN VIOLATION OF INTERNATIONAL LAW

In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures.

ARTICLE 17. INTERPRETATION OF CONVENTION

The provisions of the present Convention shall in no case be interpreted

- (a) To impose upon a State an obligation to exercise the jurisdiction which it is entitled to exercise under this Convention;
- (b) To invalidate an exercise of jurisdiction asserted upon untenable grounds, if jurisdiction might have been assumed under this Convention on other grounds;
- (c) To foreclose possible objections to the making of a particular act or omission a crime, based upon grounds falling outside the scope of this Convention.

ARTICLE 18. SETTLEMENT OF DISPUTES

(a) If there should arise between two or more of the parties to this Convention a dispute of any kind relating to the interpretation or application of the provisions of the Convention, and if the dispute cannot be settled by diplomacy, it shall be settled in accordance with any applicable agreements in force between the parties providing for the settlement of international disputes.

(b) In case there is no such agreement in force between the parties, the dispute shall be referred to arbitration or judicial settlement. Failing agreement by the parties upon the choice of another tribunal, the dispute shall be referred to the Permanent Court of International Justice; the court may exercise jurisdiction over the dispute, either under a special agreement between the parties, or upon an application by any party to the dispute.

§ 49. THE EXECUTION OF FOREIGN JUDGMENTS: PRIVATE INTERNATIONAL LAW ("CONFLICT OF LAWS")

NOTE BY THE EDITOR

An important corollary of the principle that the law of each State governs all persons within its jurisdiction is the principle that the judgments of foreign courts on matters within their jurisdiction will be respected by domestic courts. Although the judgment of a foreign court will be given no effect in the United States, for example, unless its existence has been proved in a judicial proceeding in a federal or state court, in such a judicial proceeding the effort is not to try the case *de novo*, but to ascertain whether the foreign judgment was such as to permit its being given effect in the United States. This is often said to result from the "comity of nations." In an influential dictum in 1895, the Supreme Court of the United States declared that "where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact."¹ The standards suggested in this dictum may of

¹ *Hilton v. Guyot* (1895), 159 U. S. 113, 202-203.

course be applied by the courts as reasons for refusing to give effect to the judgments of foreign tribunals. In general, it is said that courts in the United States may refuse to give effect to foreign judgments where fraud in their procurement can be shown; where giving effect to the judgment would offend the public policy of the State of the forum (this is called in Continental jurisdictions "the exception of public order"; see discussion at pages 131 ff. above); and where the judgment is for a penalty. For the general principles, see any text or casebook on private international law or the "conflict of laws."

The principle of the general acceptance and execution of foreign judgments under the safeguards above mentioned forms an important part of what is called "Private International Law," "International Private Law," or "Conflict of Laws," subject matters ordinarily distinguished from "International Law" proper, or "Public International Law," which is the field of this book. "International Law" proper deals with the rights and duties of States or other members of the international community. "Private International Law" was defined in *Hilton v. Guyot*, *supra*, as the law "concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation."² In the United States, similar problems between the States of the Union are dealt with in the Constitution: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."³

On private international law, see A. K. Kuhn, *Comparative Commentaries on Private International Law* (1937); J. H. Beale, *A Treatise on the Conflict of Laws* (1935); L. von Bar, *Theory and Practice of Private International Law*, translated by L. Gillespie (1892); American Law Institute, *Restatement of the Law of Conflict of Laws* (1934); E. G. Lorenzen, *Cases on the Conflict of Laws*, 3d ed. (1932).

C. Certain Geographical Limits to Jurisdiction

§ 50. EXTENT OF TERRITORIAL SEA

This is not a Convention, but an *Annex* to the *Final Act* of the Conference for the Codification of International Law, held at the Hague in March-April 1930. The articles below were "drawn up and provisionally approved" by the

² *Ibid.*, at 163.

³ Art. IV, Sec. 1.

Conference "with a view to their possible incorporation in a general convention on the territorial sea." It is to be noted that on the essential matters of the extent of the territorial sea and of a contiguous zone, no agreement was reached.

The following account by Professor J. S. Reeves helps to explain why no statement of a "three-mile limit" was possible:

"... The discussion on the subject of the breadth of the marginal sea was undoubtedly the most interesting of any during the course of the Commission's sessions. A direct vote on the question was avoided, but each country represented was permitted to set forth its views, with some rather surprising results. None of the Latin-American states had answered the question, earlier discussed, propounded by the Preparatory Committee. As the positions of the various governments represented upon the Commission were announced, it appeared that all of the Latin-American states there represented, with the exception of Chile, expressed themselves in favor of a width of six miles. As the discussion developed, views were set forth which might have served as answers to the question of the Preparatory Committee. What should be the limit of the territorial sea? These countries answered three miles: South Africa, Germany, the United States, Belgium, Chile, Great Britain, Australia, Canada, China, Egypt, Estonia, France, Greece, India, the Irish Free State, Japan, the Netherlands, and Poland, to which Finland and Denmark may be added, a total of twenty. Denmark agreed to Basis III in principle, but declined to give a definite decision. Finland preferred four miles, but was willing to join in an agreement as to three miles with the recognition of an adjacent zone. The following countries declared for a six-mile width: Brazil, Colombia, Cuba, Spain, Italy, Latvia, Persia, Portugal, Roumania, Turkey, Uruguay, Yugoslavia, twelve. Norway, Sweden, and Iceland claimed, each for itself, four miles without, however, proposing that this or any other limit be adopted for all countries. Czechoslovakia, having no coast line, abstained, while the Soviet Union expressed itself in favor of a maximum freedom of navigation without advocating any general rule as to width.

"The positions of those countries which favored a three-mile limit was complicated by the problem of the contiguous zone. Of the twenty countries which ranged themselves as in favor of the three-mile limit of sovereignty, a considerable group did so upon condition that a contiguous zone of some kind should be recognized. These were Germany, Belgium, Chile, Egypt, Estonia, Finland, France, and Poland, eight. Of the countries which favored a three-mile limit and expressed opposition to any contiguous zone were Great Britain (with Australia, South Africa, Canada, India, and the Irish Free State) and Japan. Greece found no contiguous zone necessary but might accept one. The United States and China made no expression as to a contiguous zone in principle. The Netherlands reserved the question.

"Summing up the position of what may be called the three-mile-limit countries, only the British Commonwealth of Nations and Japan were squarely in favor without a contiguous zone; while eight among them, including Germany and France, were in favor but only with a contiguous zone added; while three, including the United States, were noncommittal. What effect may these differences have upon the proposition that in international law the maximum breadth of the marginal sea is three nautical miles? Certainly the proposition is by no means strengthened nor is this conclusion modified when one analyzes the positions of the twelve countries which opposed the three-mile limit. Three of these were for a six-mile limit without reference to a contiguous zone—Italy, Brazil,

and Colombia. Chile likewise was for a six-mile limit if a three-mile width plus a contiguous zone was not accepted. Favoring a six-mile limit but reserving the question of a contiguous zone were Roumania, Uruguay, and Yugoslavia. In favor of a six-mile limit plus an adjacent zone were Cuba, Spain, Latvia, Persia, Portugal, and Turkey. It is unnecessary to dwell upon the varying extents of coast line and the relative importance of the merchant marine of these countries which showed such different points of view. It may be that the delegations of some countries, in urging a six-mile limit, insufficiently realized the additional burden of duty which such an extent of jurisdiction would entail upon the littoral state, not only in time of peace but most certainly in time of war. Nevertheless, there was much insistence on the part of many of the necessity of a broader width for the conservation of fisheries inuring to the benefit of the littoral state, a position with which the absolute 'three-milers' expressed considerable sympathy. The recognition of the three-mile limit involves a maximum of freedom of navigation on the high seas and the Commission was reminded of this by Sir Maurice Gwyer of the British delegation, stating that the limit of three miles was recognized 'and adopted by maritime nations which possess nearly 80% of the effective tonnage of the world.' No doubt a statement of the percentage of the coast line possessed by these same countries would be equally impressive."—"Codification of the Law of Territorial Waters," 24 *A.J.I.L.* (1930) 486, at 492-494.

The Legal Status of the Territorial Sea ¹

*Publications of the League of Nations. V. Legal Questions. 1930.
V. 9 (Annex I, pp. 6-10.)*

GENERAL PROVISIONS

ARTICLE 1. The territory of a State includes a belt of sea described in this Convention as the territorial sea.

Sovereignty over this belt is exercised subject to the conditions prescribed by the present Convention and the other rules of international law.

ARTICLE 2. The territory of a Coastal State includes also the air space above the territorial sea, as well as the bed of the sea, and the subsoil.

Nothing in the present Convention prejudices any conventions or other rules of international law relating to the exercise of sovereignty in these domains.

RIGHT OF PASSAGE

ARTICLE 3. "Passage" means navigation through the territorial sea for the purpose either of traversing that sea without entering inland waters, or of proceeding to inland waters, or of making for the high sea from inland waters.

Passage is not *innocent* when a vessel makes use of the territorial sea of a Coastal State for the purpose of doing any act prejudicial to the security, to the public policy or to the fiscal interests of that State.

¹ Observations on the text of each article are omitted.—Ed.

Passage includes stopping and anchoring, but in so far only as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.

I. VESSELS OTHER THAN WARSHIPS

ARTICLE 4. A Coastal State may put no obstacles in the way of the innocent passage of foreign vessels in the territorial sea.

Submarine vessels shall navigate on the surface.

ARTICLE 5. The right of passage does not prevent the Coastal State from taking all necessary steps to protect itself in the territorial sea against any act prejudicial to the security, public policy or fiscal interests of the State, and, in the case of vessels proceeding to inland waters, against any breach of the conditions to which the admission of those vessels to those waters is subject.

ARTICLE 6. Foreign vessels exercising the right of passage shall comply with the laws and regulations enacted in conformity with international usage by the Coastal State, and, in particular, as regards:

- (a) the safety of traffic and the protection of channels and buoys;
- (b) the protection of the waters of the Coastal State against pollution of any kind caused by vessels;
- (c) the protection of the products of the territorial sea;
- (d) the rights of fishing, shooting and analogous rights belonging to the Coastal State.

The Coastal State may not, however, apply these rules or regulations in such a manner as to discriminate between foreign vessels of different nationalities, nor, save in matters relating to fishing and shooting, between national vessels and foreign vessels.

ARTICLE 7. No charge may be levied upon foreign vessels by reason only of their passage through the territorial sea.

Charges may only be levied upon a foreign vessel passing through the territorial sea as payment for specific services rendered to the vessel. These charges shall be levied without discrimination.

ARTICLE 8. A Coastal State may not take any steps on board a foreign vessel passing through the territorial sea to arrest any person or to conduct any investigation by reason of any crime committed on board the vessel during its passage, save only in the following cases.

- (1) if the consequences of the crime extend beyond the vessel; or
- (2) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or
- (3) if the assistance of the local authorities has been requested by the captain of the vessel or by the consul of the country whose flag the vessel flies.

The above provisions do not affect the right of the Coastal State to take

any steps authorised by its laws for the purpose of an arrest or investigation on board a foreign vessel in the inland waters of that State or lying in its territorial sea, or passing through the territorial sea after leaving the inland waters.

The local authorities shall in all cases pay due regard to the interests of navigation when making an arrest on board a vessel.

ARTICLE 9. A Coastal State may not arrest nor divert a foreign vessel passing through the territorial sea, for the purpose of exercising civil jurisdiction in relation to a person on board the vessel. A Coastal State may not levy execution against or arrest the vessel for the purpose of any civil proceedings save only in respect of obligations or liabilities incurred by the vessel itself in the course of or for the purpose of its voyage through the waters of the Coastal State.

The above provisions are without prejudice to the right of the Coastal State in accordance with its laws to levy execution against, or to arrest, a foreign vessel in the inland waters of the State or lying in the territorial sea, or passing through the territorial sea after leaving the inland waters of the State, for the purpose of any civil proceedings.

ARTICLE 10. The provisions of the two preceding Articles (Arts. 8 and 9) are without prejudice to the question of the treatment of vessels exclusively employed in a governmental and non-commercial service, and of the persons on board such vessels.

ARTICLE 11. The pursuit of a foreign vessel for an infringement of the laws and regulations of a Coastal State begun when the foreign vessel is within the inland waters or territorial sea of the State may be continued outside the territorial sea so long as the pursuit has not been interrupted. The right of pursuit ceases as soon as the vessel which is pursued enters the territorial sea of its own country or of a third State.

The pursuit shall only be deemed to have begun when the pursuing vessel has satisfied itself by bearings, sextant angles, or other like means that the pursued vessel or one of its boats is within the limits of the territorial sea, and has begun the pursuit by giving the signal to stop. The order to stop shall be given at a distance which enables it to be seen or heard by the other vessel.

A capture on the high sea shall be notified without delay to the State whose flag the captured vessel flies.

2. WARSHIPS

ARTICLE 12. As a general rule, a Coastal State will not forbid the passage of foreign warships in its territorial sea and will not require a previous authorisation or notification.

The Coastal State has the right to regulate the conditions of such passage.

Submarines shall navigate on the surface.

ARTICLE 13. If a foreign warship passing through the territorial sea does not comply with the regulations of the Coastal State and disregards any request for compliance which may be brought to its notice, the Coastal State may require the warship to leave the territorial sea.

§ 51. HOVERING AND "HOT PURSUIT"

NOTE BY THE EDITOR

The United States is one of the nations which has long exercised jurisdiction beyond the three-mile limit, at least for special purposes. Since 1790, Federal "Hovering Acts" have authorized the boarding and search of vessels, both foreign and domestic, "within four leagues of the coast," for the purpose of enforcing the revenue laws, 1 Stat. 145, 164; although until the Tariff Act of 1922 this authority had been confined to inbound vessels. In 1804, the Supreme Court of the United States in a case on a contract of insurance upheld the right of the Portuguese Government to seize a vessel suspected of illicit trade beyond the three-mile limit. *Church v. Hubbard* (1804), 2 Cranch 187. After the enactment of the National Prohibition Act, seizures of vessels even outside the four-league limit of the Hovering Acts were upheld by the courts, *U. S. v. Bengochea* (1922) 279 Fed. 537, without even the support of the theory (*The Grace and Ruby* [1922] 283 F. 475) that the act of unloading through small boats to the shore brought the offense of the seized vessel within the three-mile limit. Great Britain protested the seizure of certain British ships beyond the three-mile limit, but it was not until the judgment of the United States Supreme Court in *Cunard S. S. Co. v. Mellon* (1923) 262 U. S. 100, declaring that the National Prohibition Act forbade the carriage of intoxicating beverages even as sea stores or cargo, within United States territorial waters, that Great Britain was ready to enter into a treaty arrangement. The Treaty of 1924 embodied two principles: (1) "that three marine miles extending from the coast line outwards and measured from low-water mark constitute the proper limits of territorial waters," and (2) that the United States might visit, search, and seize vessels outside the territorial waters for the purpose of preventing importation of prohibited alcoholic beverages, provided this was not done at a greater distance from the coasts of the United States than could be traversed in one hour by the vessel suspected of endeavoring to commit the offense. In *Cook v. United States* (1933) 288 U. S. 102, the Supreme Court held that this treaty governed the seizure of British ships despite the possibility of constru-

ing the Tariff Acts of 1922 and 1930 as complete authority to seize foreign vessels within the four-league limit. The United States entered into similar treaties with several other States. In 1935, Congress enacted an Anti-Smuggling Act, 49 Stat. 517, authorizing the President to establish "customs enforcement areas" outside the "customs waters" of the United States. "Customs waters" were defined as those "within four leagues of the coast" except where treaties authorized the United States to exercise jurisdiction otherwise, in which case "customs waters" were determined by the treaty rule. The "customs enforcement areas" were to be only those where the presence of vessels "occasioned, promoted, or threatened" the unlawful introduction into or removal from, the United States, of persons or goods. Such areas might not extend more than one hundred nautical miles from the place of such vessels, and not more than fifty from the outward limit of "customs waters." Within the period of existence of "customs enforcement areas," searches and seizures of vessels might be made therein, if not in contravention of existing treaties.

The historic insistence of the United States upon a right to exercise jurisdiction for certain purposes outside the three-mile limit has never been given a more succinct rationale than that given by Chief Justice Marshall in 1804:

That the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the *Aurora* [outside the three-mile limit] . . . cannot be admitted. To reason from the extent of protection a nation will afford to foreigners to the extent of the means it may use for its own security, does not seem to be perfectly correct. It is opposed by principles which are universally acknowledged. The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile act which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory. Upon this principle the right of a belligerent to search a neutral vessel on the high seas for contraband of war is universally admitted, because the belligerent has a right to prevent the injury done to himself by the assistance intended for his enemy: so too a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right, is an injury to itself which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.

In different seas, and on different coasts, a wider or more contracted range, in which to exercise the vigilance of the government, will be assented to. Thus in the channel, where a very great part of the commerce to and from all the

north of Europe, passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade, must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the government may be extended somewhat further; and foreign nations submit to such regulations as are reasonable in themselves, and are really necessary to secure that monopoly of colonial commerce, which is claimed by all nations holding distant possessions.¹

"Hot pursuit."—"The pursuit of a foreign vessel for an infringement of the laws and regulations of a Coastal State begun when the foreign vessel is within the inland waters or territorial sea of the State may be continued outside the territorial sea so long as the pursuit has not been interrupted. The right of pursuit ceases as soon as the vessel which is pursued enters the territorial sea of its own country or of a third State." This paragraph of Article 11 of "The Legal Status of the Territorial Sea" (see page 226) states what is known as the right (or doctrine) of "hot pursuit."

The statement of L. H. Woolsey in 1912 "that the question whether municipal seizures beyond the three-mile limit are legal has been decided affirmatively by the municipal courts, bound by municipal law, and negatively by international tribunals governed by international law"² still appears to be accurate as applied to cases of hot pursuit. Judgments of national courts upholding the right of hot pursuit are: *The Ship North v. The King* (1906) 37 Canada Supreme Court Reports, 385 (pursuit begun inside three-mile limit, ended shortly outside); *Gillam v. U. S.* (1928) 27 F. (2nd) 296 (pursuit begun outside three-mile limit but within four-league limit and one hour's steaming distance of coast under liquor treaty of 1924; seizure apparently outside both the four-league limit and the hour's steaming distance), affirmed in 278 U. S. 635. Cases in international tribunals denying the right of hot pursuit are: cases of J. H. Lewis and C. H. White, United States-Russia Arbitration of 1902, U. S. *Foreign Relations*, 1902, 454, 456, and 459, 462 ("the jurisdiction of a State does not extend beyond the limits of the territorial sea, unless this rule has been derogated by a special convention"); *The Itata*, United States-Chile Mixed Claims Commission, Convention of 1892, 3 Moore, *Arbitrations*, 3067.

The much-discussed case of the *I'm Alone* was decided in 1935 by the Commissioners agreed upon by the United States and Great Britain, without any decision on the question of hot pursuit, though that question had received much attention in the arguments.

The *I'm Alone*, known to be a liquor smuggler, was sighted off the coast of Louisiana by the Coast Guard vessel *Wolcott*, when it was outside the three-mile limit but within one hour's sailing distance from shore. The

¹ *Church v. Hubbard* (1804) 2 Cranch 187, 234-235.

² U. S. *For. Rel.*, 1912, p. 1297.

I'm Alone refused the *Wolcott's* request to permit search and headed for the open ocean; the *Wolcott* fired three shots across her bows, followed by shots into the rigging, until its gun jammed. Pursuing the *I'm Alone*, the *Wolcott* summoned assistance by radio. On the second day after the pursuit began, the Coast Guard cutter *Dexter* joined the pursuit, and on failure of the *I'm Alone* to heed a warning to heave to or be sunk, the *Dexter* sank the *I'm Alone*, rescuing all except one member of its crew from the heavy seas. The sinking took place more than two hundred miles from the coast of the United States.

The Final Report of the Commissioners declared that the sinking of the *I'm Alone* outside the territorial waters of the United States was unjustified either by anything in the Convention of 1924 or by any principle of international law, and awarded "His Majesty's Canadian Government" apology and compensation for the sinking. It is possible to contend that this award was based on the conception that there was no international right of hot pursuit covering the events which preceded the sinking; but it is also possible to argue that, even admitting a right of hot pursuit, the right does not include the right to sink a vessel which resists seizure forcibly on the high seas in peacetime. The award is inconclusive, especially since the Joint Interim Report of the Commission in 1933 confessed the members' lack of agreement on the question of hot pursuit. Had the Final Report been more explicit, answers might have been given to interesting questions. One may, however, sympathize with the diffidence of the Commissioners as to hot pursuit. Is there any right of hot pursuit in international, as distinguished from municipal, law? If so, may the pursuit begin within a one-hour's steaming distance established by a treaty (itself embodying a limited statement of hot pursuit), or must it begin within the recognized three-mile limit? May a vessel which was not present at the beginning of the pursuit, join it later and exercise rights which only exist at all because the pursuit is "hot"?⁸

States may, of course, enter into treaties embodying a right of hot pursuit. The rule of one hour's steaming distance in the liquor treaties entered into by the United States may be regarded from one point of view as embodying a limited expression of such a right.

§ 52. BAYS

By an Act of June 5, 1882 [22 Stat. 98], Congress directed the Court of Commissioners of Alabama Claims to examine and enter judgment upon "claims

⁸ On the *I'm Alone*, see U. S. Department of State, *Arbitration Series*, No. 2 (Nos. 1-7); W. C. Dennis, "The Sinking of the *I'm Alone*," 23 *A.J.I.L.* (1929), 351; G. G. Fitzmaurice, "The Case of the *I'm Alone*," 17 *B.Y.I.L.* (1936), 82; C. C. Hyde, "Adjustment of the *I'm Alone* Case," 29 *A.J.I.L.* (1933), 296.

directly resulting from damage done on the high seas by Confederate cruisers, including vessels and cargoes attacked on the high seas. . . . The question which the Commissioners had to answer in this instance was whether the *Alleganean* was attacked on the high seas under the statute, while it was lying at anchor in Chesapeake Bay.

Stetson v. United States

[*The Alleganean*]

COURT OF COMMISSIONERS OF ALABAMA CLAIMS, 1885

32 *Albany Law Journal*, 484.

DRAPER, J.: The facts upon which a judgment to the amount of \$69,334.80 is prayed for in this case are substantially as follows:

The ship *Alleganean*, duly registered at the port of New York, and being recently repaired and well equipped and entitled to the protection of the United States, cleared with a cargo from the port of Baltimore on the 22d of October, 1862, upon a voyage to London. Six days later, at about 10:30 o'clock in the evening, being at anchor, through rough water, in Chesapeake Bay, south of the mouth of the Rappahannock river and opposite Guinn's Island, she was boarded by some eighteen officers and men of the Confederate navy, commanded by Lieutenants John Taylor Wood and S. Smith Lee. These leaders were commissioned officers in the Confederate navy, and in the attack upon the *Alleganean* they were acting under the special orders of the secretary of the navy of the Confederate States, and the men accompanying them had been specially detailed from the James river squadron for the purpose of preying upon United States merchant vessels in Chesapeake Bay. They came overland to Chesapeake Bay from the *Patrick Henry*, an armed and commissioned Confederate vessel and securing two or three small vessels—the largest being of fifteen or twenty tons burden—had been cruising about two or three nights before the attack. . . .

This force boarded the *Alleganean*, as stated, speedily reduced the crew of that vessel to subjection and the state of prisoners of war, and then burned the ship, totally destroying her, except that some few remnants were afterwards picked up and disposed of, the proceeds of which the owners account for in making up their claim . . . at \$52,591.03, and by the witnesses for the claimants at amounts varying from \$60,000 to \$75,000.

The evidence seems to establish beyond question the fact that the vessel was more than four miles from any shore at the time of capture and destruction. . . .

The term "high seas," as used by legislative bodies, the courts and text-writers, has been construed to express a widely different meaning. As used to define the jurisdiction of admiralty courts it is held to mean the waters

of the ocean exterior to low-water mark. As used in international law, to fix the limits of the open ocean, upon which all peoples possess common rights, the "great highway of nations," it has been held to mean only so much of the ocean as is exterior to a line running parallel with the shore and some distance therefrom, commonly such distance as can be defended by artillery upon the shore, and therefore a cannon-shot or a marine league (three nautical or four statute miles). This court, after very able argument by learned counsel, and after much deliberation has held that the term was used in the act of June 5, 1882, in the same sense in which it is employed by the international law writers. *Rich v. United States*.

From this it necessarily follows that such portions of the waters of Chesapeake bay as are within four miles of either shore form no part of the high seas. But much of the bay is more than four miles from shore, and is accessible from the ocean without coming within that distance of the land. The distance between Cape Henry and Cape Charles, at the entrance of the bay, is said to be twelve miles, and it is stated that lines starting from points between the capes, four miles from each, and running up the bay that distance from either shore, would not intercept each other within 125 miles from the starting points. The evidence shows that the *Alleganean* was anchored between such lines at the time of destruction. Was she upon the high seas as the court defines the statutory term?

By common agreement all the authorities assert that there are arms or inlets of the ocean which are within territorial jurisdiction, and are not high seas. Sir R. Phillimore (1 Int. Law, § 200), says:

"Besides the rights of property and jurisdiction within the limit of cannon-shot from the shore, there are certain portions of the sea which, though they exceed this verge, may under special circumstances be prescribed for. Maritime territorial rights extend, as a general rule, over arms of the sea, bays, gulfs, estuaries which are inclosed, but not entirely surrounded, by lands belonging to one and the same State. . . . Thus Great Britain has immemorially claimed and exercised exclusive property and jurisdiction over the bays or portions of the sea cut off by lines drawn from one promontory to another, and called the King's Chambers."

Grotius (bk. 11, ch. 3, §§ 7, 8) and Vattel (vol. 1, bk. 1, ch. 23, § 291) assert substantially the same doctrine, and the later writers follow them. Wheat. Int. Law (Dana's 8th Ed., p. 255) says:

"The maritime territory of every State extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea, inclosed by headlands, belonging to the same State. The usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon shot will reach from the shore, along the coasts of the State. Within these

limits its right of property and territorial jurisdiction are absolute, and exclude those of every other nation."

Chancellor Kent avows the general doctrine and makes very much broader claims in reference to the jurisdiction of the United States over adjacent waters, and says (Com., vol. 1, pp. 29, 30):

"Considering the great line of the American coasts we have a right to claim for fiscal and defensive regulations a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume for domestic purposes connected with our safety and welfare the control of waters on our coasts, though included within lands stretching from quite distant headlands, as for instance from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the Capes of the Delaware, and from the South Cape of Florida to the Mississippi."

Dr. Woolsey (Int. Law, § 60) upholds the general doctrine, but thinks the claims of Chancellor Kent are too broad, and rather "out of character for a nation that has ever asserted the freedom of doubtful waters, as well as contrary to the spirit of more recent times."

Dr. Wharton (Int. Law, § 192) finishes the subject with the conclusion: "That it would seem more proper to adopt the test of cannon-shot, * * * which would, in case of waters whose headlands belong to the same sovereign, exclude all bays more than eighteen miles in diameter, assuming the range of cannon-shot to be nine miles. But this should be made to yield to usage. If a particular nation has exercised dominion over a bay, and this has been acquiesced in by other nations, then the bay is to be regarded as belonging to such nation."

We are quite certain that none of the American courts have passed upon this subject, although decisions holding that specified waters are within or without the jurisdiction of the admiralty courts are numerous. The question has however been before the English courts upon two occasions at least.

Reg. v. Cunningham, Bell Crown Cas. 72, was the case of a crime committed upon an American vessel lying in the Bristol channel, about three-quarters of a mile off the shores of the county of Glamorgan, in Wales, but below or exterior to low-water mark, and perhaps ten miles from the shores of the county of Somerset, in England. The prisoners were indicted and tried in Glamorgan. The question was whether the crime was committed within the county of Glamorgan or upon the high seas. It was held that it was within the county. This crime was committed, it is true, within the marine league from shore, but the court did not rest its conclusion upon that ground. Lord Chief Justice Cockburn, delivering the opinion of the court, said:

"Looking at the local situation of this sea, it must be taken to belong to the counties, respectively, by the shores of which it is bounded. * * *

The whole of this inland sea, between the counties of Somerset and Glamorgan, is to be considered as within the counties by the shores of which its several ports are respectively bounded."

But perhaps the most thoroughly considered and important case is that of *Direct U. S. Cable Co. v. Anglo-American Tel. Co.* in the House of Lords, 2 App. Cas. 349. It came up on an appeal from the Supreme Court of Newfoundland against an order confirming an injunction preventing the Direct Cable Company from landing their wire upon the soil of Newfoundland, on the ground that it would be an infringement of the rights of the Anglo-American Company. The cable, as a matter of fact, was buoyed in Conception bay, more than a marine league from shore, and it nowhere came within that distance from the shore, purposely to avoid coming within territorial jurisdiction. But it was asserted that the whole of Conception bay was within the territory and jurisdiction of Newfoundland. The Supreme Court of the Province so held, and the determination was upheld by the House of Lords in a somewhat elaborate opinion.

This opinion states that Conception bay is a body of water having an average width of fifteen miles, a distance of forty miles from the head to one of the capes at the entrance and fifty miles to the other, and a distance of twenty miles between the headlands. Coming to the question, the Lords say (p. 419):

"We find a universal agreement that harbors, estuaries, and bays, land-locked, belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is 'bay' for this purpose. It seems generally agreed that where the configuration and dimensions of the bay are such as to show that the nation occupying the adjoining coasts also occupies the bay, it is part of the territory; and with this idea most of the writers on the subject refer to defensibility from the shore as the test of occupation; some suggesting therefore a width of cannon-shot from shore to shore; some a cannon-shot from each shore; some an arbitrary distance of ten miles. All of these are rules which, if adopted, would exclude Conception bay from the territory of Newfoundland, but also would have excluded from the territory of Great Britain that part of the British Channel which in *Reg. v. Cunningham* was held to be in the county of Glamorgan.

"It does not appear to their lordships that jurists and text writers are agreed what are the rules as to dimensions and configuration, which apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the State possessing the adjoining coasts, and it has never, that they can find, been made the ground of any judicial determination. If it were necessary in this case to lay down a rule, the difficulty of the task would not deter their lordships from attempting to fulfill it. But

in their opinion it is not necessary. It seems to them that in point of fact the British government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations. * * * This would be very strong in the tribunals of any country to show that by prescription this bay is a part of the exclusive territory of Great Britain. In a British tribunal it is decisive."

We must now examine the local circumstances touching the status of Chesapeake bay, and then determine whether those waters should be held to be the open ocean or jurisdiction waters of the United States in the light of these authorities.

The headlands are about twelve miles apart, and the bay is probably nowhere more than twenty miles in width. The length may be 200 miles. To call it a bay is almost a misnomer. It is more a mighty river than an arm or inlet of the ocean. It is entirely encompassed about by our own territory, and all of its numerous branches and feeders have their rise and their progress wholly in and through our own soil. It cannot become an international commercial highway; it is not and cannot be made a roadway from one nation to another. . . .

The legislation of Congress has assumed Chesapeake bay to be within the territorial limits of the United States. . . .

The position taken by this government and by England and France in the matter of the British brig *Grange*, captured in Delaware bay in 1793 by the French steamer *l'Embuscade* (1 Am. State Papers, 147, 149), has, it seems to us, an important bearing upon the question under discussion. The brig was seized and the crew made prisoners, the two foreign governments being at war. The British government must have demanded that the United States compel France to release the captured vessel on the ground that the seizure was unlawful as having been made in our territorial and neutral waters. The State papers do not show this demand, but it is not material. The opinion of the attorney-general was asked, and was given somewhat elaborately by Mr. Randolph. 1 Op. Att'ys-Gen'l, 32. It quotes the text-writers, and concludes that the whole of Delaware bay is within the territorial jurisdiction of the United States, regardless of the marine league or cannon-shot limit from the shore. The learned attorney-general says: "In like manner is excluded every consideration of how far the spot of seizure was capable of being defended by the United States; for although it will not be conceded that this could not be done, yet will it rather appear that the mutual rights of the States of New Jersey and Delaware up to the middle of the river supersede the necessity of such an investigation. No. The cornerstone of our claim is that the United States are proprietors of the lands on both sides of the Delaware from its head to its entrance into the sea."

Acting upon the opinion of the attorney-general, the secretary of state, Mr. Jefferson, demanded that France should make restitution of the *Grange*, and set the prisoners taken upon her at liberty, which demand was promptly and cheerfully complied with by the French government.

If it be said that the mere claims of a nation to jurisdiction over adjacent waters are to be accepted with some degree of hesitation, then the action in reference to the *Grange* is of much weight, for there the claim made by the United States was promptly acquiesced in by two great foreign powers, when passions were excited, and when such acquiescence was greatly against the immediate interest of one of the combatants, as well as against the general interest of both.

It will hardly be said that Delaware bay is any the less an inland sea than Chesapeake bay. Its configuration is not such as to make it so, and the distance from Cape May to Cape Henlopen is apparently as great as that between Cape Henry and Cape Charles.

Reflection upon the subject has caused the court to consider this question of very considerable national importance. Contingencies might arise which would make it of very grave import. The "high sea" belongs to all alike. It is the great highway of nations. One cannot lawfully do anything upon it which any other has not the right to do. One cannot exercise sovereignty over it. Can an American court concede as much as to Chesapeake bay? Other nations, by common consent of all, have well-recognized peaceable rights even in our territorial waters. Ought we to admit that they have any rights hostile to the United States, or can we permit belligerent operations between foreign nations within the shores of this bay? What injustice can be done to any other nation by the United States exercising sovereign control over these waters? What annoyance and what injury may not come to the United States through a failure to do so?

Considering therefore the importance of the question, the configuration of Chesapeake bay, the fact that its headlands are well marked, and but twelve miles apart, that it and its tributaries are wholly within our own territory, that the boundary lines of adjacent States encompass it; that from the earliest history of the country it has been claimed to be territorial waters, and that the claim has never been questioned; that it cannot become the pathway from one nation to another, and remembering the doctrines of the recognized authorities upon international law, as well as the holdings of the English courts as to the British channel and Conception bay, and bearing in mind the matter of the brig *Grange* and the position taken by the government as to Delaware bay, we are forced to the conclusion that Chesapeake bay must be held to be wholly within the territorial jurisdiction and authority of the government of the United States, and no

part of the "high seas" within the meaning of the term as used in section 5 of the act of June 5, 1872. . . .

Judgment will be entered for the United States.

All concur.

§ 53. BOUNDARY RIVERS

Under the United States Constitution, the Supreme Court has original jurisdiction over suits between States, and a plaintiff State may sue a defendant State in the Supreme Court without the defendant State's specific consent. This situation presents an obvious analogy with the state of affairs which would exist if all the States of the world were bound to submit all their disputes to international tribunals for definitive settlement.

In adjudicating many of these disputes between States, the Supreme Court applies principles of international law. The case below is one of these. Many others may be found in J. B. Scott's *Judicial Settlement of Controversies between States of the American Union*, 2 vols. (1918). Some of these cases are cited in argument, considered, and approved, in cases before international arbitral tribunals.

Arkansas v. Tennessee

SUPREME COURT OF THE UNITED STATES, 1918

246 U. S. 158.

This is an original suit in equity brought by the State of Arkansas against the State of Tennessee for the purpose of determining the location of the boundary line between those States along that portion of the bed of the Mississippi River that was left dry as the result of an avulsion which occurred March 7, 1876, when a new channel was formed known as the "Centennial Cut-off."

The cause, having been put at issue by the filing of answer and replication, was brought on to hearing upon stipulated facts, pursuant to an intimation made by this court in *Cissna v. Tennessee*, 242 U. S. 195, 198.

The facts are as follows: By the Treaty of 1763 between England, France, and Spain, Art. VII (3 Jenkinson's Treaties, 177, 182), the boundary line between the British and French possessions at this place was established as "a line drawn along the middle of the River Mississippi," with consequent recognition of the dominion of France over the territory now comprising the State of Arkansas, and the dominion of Great Britain over that now comprising the State of Tennessee. By the Treaty of Peace concluded between the United States and Great Britain, September 3, 1783, 8 Stat. 80, the territory comprising Tennessee passed to the United States, its westerly boundary being described (Art. II), as "a line to be drawn along the middle of the said River Mississippi." It formed a part of the State

of North Carolina. In the year 1790 North Carolina ceded it to the United States (Act of April 2, 1790, c. 6, 1 Stat. 106). In a report made in the following year by Thomas Jefferson, then Secretary of State, and submitted to Congress by President Washington, the bounds of the ceded territory were described, the western boundary being "the middle of the river Mississippi." 1 American State Papers, Public Lands, p. 17. And by Act of June 1, 1796, c. 47, 1 Stat. 491, the whole of the territory thus ceded was made a State. By the Louisiana Purchase, under the Treaty of April 30, 1803, 8 Stat. 200, the territory comprising Arkansas was acquired by the United States from France. It was admitted into the Union as a State by Act of June 15, 1836, c. 100, 5 Stat. 50, its easterly boundary being described as "the middle of the main channel of the said river. . . ."

It is agreed that in 1823 the river ran substantially as indicated upon the Humphreys map, and that between that year and the year 1876 the width of the channel, by erosion and caving in of the Tennessee bank south, southwest, and west of Dean's Island, along the mainland and Island No. 37, had increased from its former width of about a mile or less to a width of $1\frac{1}{4}$ or $1\frac{1}{2}$ miles, with consequent narrowing of the neck of land opposite Dean's Island. . . . A steamboat reconnaissance of the river was made by Colonel Suter under the direction of the War Department in 1874, and a map of the place in question was prepared under his direction and is in evidence. There being no proof of material changes in the river between 1874 and 1876, this map, while not shown to be entirely accurate, is agreed to represent the general situation as it existed in the latter year.

On March 7, 1876, the river suddenly and with great violence, within about thirty hours, made for itself a new channel directly across the neck opposite the apex of Dean's Island, so that the old channel around the bend of the elbow (a distance of fifteen to twenty miles) was abandoned by the current, and although it remained for a few years covered with dead water it was no longer navigable except in times of high water for small boats, and this continued only for a short time, since the old bed immediately began to fill with sand, sediment, and alluvial deposits. In the course of time it became dry land suitable for cultivation and to a considerable extent covered with timber. The new channel is called, from the year in which it originated, the "Centennial Cut-off," and the land that it separated from the Tennessee mainland goes by the name of "Centennial Island." . . .

Prior to 1876, notably around "Island 37" and "Devil's Elbow," the bank on one side of the river was high and subject to erosion, the effect of the water against it; while on the opposite side of the bank was a flat or sloping shore, so that the width of the river was materially affected by the

rise and fall of the water, being considerably wider at normal than at low-water stage.

The following questions are submitted for the determination of this court:

(1) Arkansas contends that the true boundary line between the States (aside from the question of the avulsion of 1876) is the middle of the river at low water, that is, the middle of the channel of navigation; whereas Tennessee contends that the true boundary is a line equidistant from the well-defined banks at a normal stage of the river.

(2) Arkansas contends that by the avulsion of 1876 the boundary line between the States was unaffected, and remained in the middle of the river bed which was by the avulsion abandoned, whether the first or the second definition of the middle of the river be adopted; whereas Tennessee contends that the line was affected by the avulsion to the extent indicated by the opinion of the Supreme Court of that State in *State v. Muncie Pulp Co.*, 119 Tennessee, 47; that is, that the effect of the avulsion was to press back the line between the two States to the middle of the old channel as it ran previous to the erosions upon the Tennessee banks that occurred between 1823 and 1876.

(3) Tennessee contends that, irrespective of the question of accretions and erosions, it is impossible now to locate accurately the line of the river as it ran in 1876 just prior to the avulsion, and that therefore the line of 1823 must prevail as the boundary line between the States, where it has been or can be located accurately and definitely; whereas Arkansas insists that there is no real difficulty in locating the middle of the river of 1876.

Upon the determination of these points, the court is to appoint a commission to run, locate, and designate the line. . . .

MR. JUSTICE PITNEY, after stating the case as above, delivered the opinion of the court.

Concerning the proper location of an interstate boundary line with reference to the shores and channel of a navigable river separating one State of the Union from another, much has been written. The subject was brought under the consideration of this court in *Iowa v. Illinois*, 147 U. S. 1. In that case, Illinois contended that the boundary followed the middle of the channel of commerce, that is, the channel commonly used by steamboats and other craft navigating the river; while on the part of Iowa it was insisted that the line ran in the middle of the main body of the river, taking the middle line between its banks or shores, irrespective of where the channel of commerce might be, and that the measurements must be taken at ordinary stage of water. The contention of each State was supported by a decision of its court of last resort: *Dunlieth & Dubuque Bridge Co. v. County of Dubuque*, 55 Iowa, 558, 565; *Buttenuth v. St. Louis Bridge*

Co., 123 Illinois, 535, 548. This court recognized these cases as presenting in the clearest terms the different views as to the line of jurisdiction between neighboring States separated by a navigable stream, and thereupon proceeded to analyze their reasoning and doctrine. From a review of the authorities upon international law, it was declared that when a navigable river constituted the boundary between two independent States the interest of each State in the navigation, and the preservation by each of its equal right in such navigation, required that the middle of the channel should mark the boundary up to which each State on its side should exercise jurisdiction; that hence, in international law, and by the usage of European nations, the term "middle of the stream," as applied to a navigable river, meant the middle of the channel of such stream, and that in this sense the terms were used in the treaty between Great Britain, France, and Spain, concluded at Paris in 1763, so that by the language "a line drawn along the middle of the River Mississippi," as there used, the middle of the channel was indicated; that the *thalweg*, or middle of the navigable channel, is to be taken as the true boundary line between independent States for reasons growing out of the right of navigation, in the absence of a special convention between the States or long use equivalent thereto; and that although the reason and necessity of the rule may not be as cogent in this country, where neighboring States are under the same general government, yet the same rule must be held to obtain unless changed by statute or usage of so great a length of time as to have acquired the force of law; and that the Illinois Enabling Act of April 18, 1818, § 2, c. 67, 3 Stat. 428, which made "the middle of the Mississippi river" the western boundary of the State, the Missouri Enabling Act of March 6, 1820, § 2, c. 22, 3 Stat. 545, which adopted "the middle of the main channel of the Mississippi river" as the eastern boundary of that State, and the Wisconsin Enabling Act of August 6, 1846, c. 89, 9 Stat. 56, which referred to "the centre of the main channel of that river," employed these varying phrases as signifying the same thing. Hence we reached the conclusion (p. 13) that as between the different views as to the line of jurisdiction between neighboring States, separated by a navigable stream, the controlling consideration "is that which preserves to each State equality in the right of navigation in the river." It was accordingly adjudged and declared that the boundary line between the contesting States was "the middle of the main navigable channel of the Mississippi River"; and a final decree to that effect was afterwards made, 202 U. S. 59.

The rule thus adopted, known as the rule of the "*thalweg*," has been treated as set at rest by that decision. *Louisiana v. Mississippi*, 202 U. S. 1, 49; *Washington v. Oregon*, 211 U. S. 127, 134; 214 U. S. 205, 215. The argument submitted in behalf of the defendant State in the case at bar, including a reference to the notable recent decision of its Supreme Court

in *State v. Muncie Pulp Co.* (1907), 119 Tennessee, 47, has failed to convince us that this rule ought now, after the lapse of twenty-five years, to be departed from.

It is said that Arkansas has interpreted the line to be at a point equidistant from the well-defined and permanent banks of the river, that Tennessee has likewise recognized this boundary, and that by long acquiescence on the part of both States in this construction, and the exercise of jurisdiction by both in accordance therewith, the question should be treated as settled. The reference is to certain judicial decisions, and two acts of legislation. In *Cessill v. State* (1883), 40 Arkansas, 501, which was a prosecution for unlicensed sale of liquors upon a boat anchored off the Arkansas shore, it was held that the boundary line, as established by the original treaties and since observed in federal legislation, state constitutions, and judicial decisions was the "line along the river bed equidistant from the permanent and defined banks of the ascertained channel on either side." This was followed in subsequent decisions by the same court. *Wolfe v. State* (1912), 104 Arkansas, 140, 143; *Kinnanne v. State* (1913), 106 Arkansas, 286, 290. The first pertinent decision by the Supreme Court of Tennessee is *State v. Muncie Pulp Co.* (1907), 119 Tennessee, 47, in which a similar conclusion was reached, partly upon the ground that it had been adopted by the courts of Arkansas. The legislative action referred to consists of two acts of the General Assembly of the State of Tennessee (Acts 1903, p. 1215, c. 420; Acts 1907, p. 1723, c. 516), each of which authorized the appointment of a commission to confer and act with a like commission representing the State of Arkansas to locate the line between the States in the old and abandoned channel at the place that we now have under consideration; and the Act of 1907 further provided that if Arkansas should fail to appoint a commission, the Attorney General of Tennessee should be authorized to institute a suit against that State in this court to establish and locate the boundary line. These acts, far from treating the boundary as a line settled and acquiesced in, treat it as a matter requiring to be definitely settled, with the coöperation of representatives of the sister State if practicable, otherwise by appropriate litigation.

The Arkansas decisions had for their object the establishment of a proper rule for the administration of the criminal laws of the State, and were entirely independent of any action taken or proposed by the authorities of the State of Tennessee. They had no particular reference to that part of the river bed that was abandoned as the result of the avulsion of 1876; on the contrary, they dealt with parts of the river where the water still flowed in its ancient channel. The decision of the Supreme Court of Tennessee in *State v. Muncie Pulp Co.*, 119 Tennessee, 47, sustained the claim of the State to a part of the abandoned river bed which, by the rule of

the *thalweg*, would be without that State. The combined effect of these decisions and of the legislation referred to, all of which were subsequent to the year 1876, falls far short of that long acquiescence in the practical location of a common boundary, and possession in accordance therewith, which in some of the cases has been treated as an aid in setting the question at rest. *Rhode Island v. Massachusetts*, 4 How. 591, 638, 639; *Indiana v. Kentucky*, 136 U. S. 479, 510, 514, 518; *Virginia v. Tennessee*, 148 U. S. 503, 522; *Louisiana v. Mississippi*, 202 U. S. 1, 53; *Maryland v. West Virginia*, 217 U. S. 1, 41. . . .

The next and perhaps the most important question is as to the effect of the sudden and violent change in the channel of the river that occurred in the year 1876, and which both parties properly treat as a true and typical avulsion. It is settled beyond the possibility of dispute that where running streams are the boundaries between States, the same rule applies as between private proprietors, namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel. *New Orleans v. United States*, 10 Pet. 662, 717; *Jefferis v. East Omaha Land Co.*, 134 U. S. 178, 189; *Nebraska v. Iowa*, 143 U. S. 359, 361, 367, 370; *Missouri v. Nebraska*, 196 U. S. 23, 34-36.

There is controversy with respect to the application of the foregoing rule to the particular circumstances of this case. It is insisted in behalf of the State of Tennessee that since the rule of the *thalweg* derives its origin from the equal rights of the respective States in the navigation of the river, the reason for the rule and therefore the rule itself ceases when navigation has been rendered impossible by the abandonment of a portion of the river bed as the result of an avulsion. In support of this contention we are referred to some expressions of Vattel, Almeda, Moore, and other writers; but we deem them inconclusive, and are of the opinion, on the contrary, that the contention runs counter to the settled rule and is inconsistent with the declarations of this court, in *Nebraska v. Iowa*, 143 U. S. 359, 367, that "avulsion would establish a fixed boundary, to wit: the centre of the abandoned channel," or, as it is expressed on page 370, "the boundary was not changed, and it remained as it was prior to the avulsion, the centre line of the old channel," and in *Missouri v. Nebraska*, 196 U. S. 23, 36, that the boundary line "must be taken to be the middle of the channel of the river as it was prior to such avulsion."

It is contended, further, that since the avulsion of 1876 caused the old river bed to dry up, what is called "the doctrine of the submergence and reappearance of land" must be applied, so as to establish the ancient boundary as it existed at the time of the earliest record, in this case the year 1823, with the effect of eliminating any shifting of the river bed that resulted from the erosions and accretions of the half century preceding the avulsion.

This contention is rested chiefly upon a quotation from Sir Matthew Hale, *De Jure Maris*, c. 4: "If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced; yet if by situation and extent of quantity, and bounding upon the firm land, the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject doth not lose his propriety; and accordingly it was held by Cooke and Foster, M. 7 Jac. C. B., though the inundation continue forty years." (1 Hargraves' Law Tracts, 15; Note to *Ex parte Jennings*, 6 Cow. 542.) To the same effect, 2 Roll. Abr. 168 1. 48; 7 Comyns' Dig., tit. Prerogative, D. 61, 62; 5 Bacon's Abr., tit. Prerogative, B. 1. A reference to the context shows that the portion quoted is a statement of one of several exceptions to the general rule that any increase of land *per relictionem*, or sudden recession of the sea, belonged of common right to the King as a part of his prerogative. It amounts to no more than saying that where the reliction did but restore that which before had been private property and had been lost through the violence of the sea, the private right should be restored if the land is capable of identification. Such a case was *Mulry v. Norton*, 100 N. Y. 424, the true scope of which decision was pointed out in *In re City of Buffalo*, 206 N. Y. 319, 326, 327. But this doctrine has no proper bearing upon the rule we have stated with reference to boundary streams. Certainly it cannot be regarded as having the effect of carving out an exception to the rule that where the course of the stream changes through the operation of the natural and gradual processes of erosion and accretion, the boundary follows the stream; while if the stream leaves its former bed and establishes a new one as the result of an avulsion, the boundary remains in the middle of the former channel. An avulsion has this effect, whether it results in the drying up of the old channel or not. So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant, the effect of these processes is at an end; the boundary then becomes fixed in the middle of the channel as we have defined it, and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores but as an ultimate effect of the avulsion. The emergence of the land, however, may or may not follow, and it ought

not in reason to have any controlling effect upon the location of the boundary line in the old channel. To give to it such an effect is, we think, to misapply the rule quoted from Sir Matthew Hale.

How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. *Pollard's Lessee v. Hagan*, 3 How, 212, 230; *Barney v. Keokuk*, 94 U. S. 324, 338; *Hardin v. Jordan*, 140 U. S. 371, 382; *Shively v. Bowlby*, 152 U. S. 1, 40, 58; *St. Anthony Falls Water Power Co. v. Water Commissioners*, 168 U. S. 349, 358; *Scott v. Lattig*, 227 U. S. 229, 242. Thus, Arkansas may limit riparian ownership by the ordinary high-water mark; (*Railway v. Ramsey*, 53 Arkansas, 314, 323; *Wallace v. Driver*, 61 Arkansas, 429, 435, 436;) and Tennessee, while extending riparian ownership upon navigable streams to ordinary low-water mark, and reserving as public the lands constituting the bed below that mark (*Elder v. Burrus*, 25 Tennessee [6 Humph.] 358, 368; *Martin v. Nance*, 40 Tennessee [3 Head], 649, 650; *Goodwin v. Thompson*, 83 Tennessee [15 Lea], 209), may, in the case of an avulsion followed by a drying up of the old channel of the river, recognize the right of former riparian owners to be restored to that which they have lost through gradual erosions in times preceding the avulsion, as she has done in *State v. Muncie Pulp Co.*, 119 Tennessee, 47. But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located.

It is hardly necessary to say that *State v. Muncie Pulp Co.*, *supra*, and *Stockley v. Cissna*, 119 Fed. Rep. 812, relied upon in defendant's answer as judicial determinations of the boundary line, can have no such effect against the State of Arkansas, which was a stranger to the record in both cases.

Upon the whole case we conclude that the questions submitted for our determination are to be answered as follows:

(1) The true boundary line between the States, aside from the question of the avulsion of 1876, is the middle of the main channel of navigation as it existed at the Treaty of Peace concluded between the United States and Great Britain in 1783, subject to such changes as have occurred since that time through natural and gradual processes.

(2) By the avulsion of 1876 the boundary line between the States was unaffected, and remained in the middle of the former main channel of navigation, as above defined.

(3) The boundary line should now be located according to the middle of that channel as it was at the time the current ceased to flow therein as a result of the avulsion of 1876.

(4) A commission consisting of three competent persons, to be named by the court upon the suggestion of counsel, will be appointed to run, locate, and designate the boundary line between the States at the place in question in accordance with the above principles.

(5) The nature and extent of the erosions and accretions that occurred in the old channel prior to its abandonment by the current as a result of the avulsion of 1876, and the question whether it is practicable now to locate accurately the line of the river as it then ran, will be referred to said commission, subject to a review of its decision by this court if need be.

The parties may submit the form of an interlocutory decree to carry into effect the above conclusions.¹

D. Certain Exceptions from Territorial Jurisdiction

§ 54. GENERAL

The Case of the Schooner *Exchange* has become one of the classics of international law. Its doctrine of exemption of public ships is still the law except as modified by treaty, as will be seen from *Berizzi Bros. Co. v. Steamship Pesaro* (§ 55); and its statement of the principles of exclusive territorial jurisdiction and the grounds for exceptions therefrom, though to some extent *dicta*, still constitute a valuable introduction to the subject.

The Schooner *Exchange* v. M'Faddon

SUPREME COURT OF THE UNITED STATES, 1812

7 Cranch (U. S.), 116.

[The *Exchange*, a schooner belonging to John M'Faddon and William Greetham, citizens of Maryland, was seized by officers of Napoleon under the Rambouillet Decree. It was then armed and commissioned as a public vessel of France, under the name *Balaou*. On a subsequent voyage to the West Indies, the *Balaou* put into the port of Philadelphia; whereupon it was libeled by M'Faddon, *et al.* The French Government did not appear as claimant; but the United States Attorney filed a suggestion with the District Court that the vessel was a public vessel of France, with whom

¹ On boundary rivers, see also *New Jersey v. Delaware* (1934) 291 U. S. 361; *The Chamizal Arbitration*, U. S.-Mexico International Boundary Commission (1911), printed in 5 *A.J.I.L.* (1911), 785. On international rivers, see § 58, at page 278.—Ed.

the United States was at peace, and was consequently not within the jurisdiction of the Court. The District Court dismissed the libel on these grounds, the Circuit Court reversed this sentence, and the District Attorney appealed to the Supreme Court of the United States.]

MARSHALL, C. J., delivered the opinion of the court, as follows:

This case involves the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States.

The question has been considered with an earnest solicitude, that the decision may conform to those principles of national and municipal law by which it ought to be regulated.

In exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this.

The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restrictions.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.

A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory.

If he enters that territory with the knowledge and license of its sovereign, that license, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation.

Why has the whole civilized world concurred in this construction? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection that the license has been obtained. The character to whom it is given, and the object for which it is granted, equally require that it should be construed to impart full security to the person who has obtained it. This security, however, need not be expressed; it is implied from the circumstances of the case. Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which is not necessary to any conclusion to which the court may come in the cause under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign, whose dominions he had entered, it would seem to be because all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity has placed in their hands.

2d. A second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers.

Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or

by a political fiction suppose him to be extra-territorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides; still, the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of ex-territoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.

This consent is not expressed. It is true that in some countries, and in this among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them.

3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.

In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and

duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

But if, without such express permit, an army should be led through the territories of a foreign prince, might the jurisdiction of the territory be rightfully exercised over the individuals composing this army?

Without doubt, a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign. But if his consent, instead of being expressed by a particular license, be expressed by a general declaration that foreign troops may pass through a specified tract of country, a distinction between such general permit and a particular license is not perceived. It would seem reasonable that every immunity which would be conferred by a special license, would be in like manner conferred by such general permit.

We have seen that a license to pass through a territory implies immunities not expressed, and it is material to inquire why the license itself may not be presumed?

It is obvious that the passage of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominion it passed. Such a practice would break down some of the most decisive distinctions between peace and war, and would reduce a nation to the necessity of resisting by war, an act not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a power whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like these that the general license to foreigners to enter the dominions of a friendly power, is never understood to extend to a military force; and an army marching into the dominions of another sovereign, may justly be considered as committing an act of hostility; and, if not opposed by force, acquires no privileges by its irregular and improper conduct. It may, however, well be questioned whether any other than the sovereign power of the State be capable of deciding that such military commander is without a license.

But the rule which is applicable to armies, does not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers often, indeed generally, attending it, do not ensue from admitting a ship of war, without special license, into a friendly port. A dif-

ferent rule therefore, with respect to this species of military force, has been generally adopted. If, for reasons of state, the ports of a nation generally, or any particular ports, be closed against vessels of war generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports, and to remain in them while allowed to remain, under the protection of the government of the place.

In almost every instance, the treaties between civilized nations contain a stipulation to this effect in favor of vessels driven in by stress of weather or other urgent necessity. In such cases, the sovereign is bound by compact to authorize foreign vessels to enter his ports. The treaty binds him to allow vessels in distress to find refuge and asylum in his ports, and this is a license which he is not at liberty to retract. It would be difficult to assign a reason for withholding from a license, thus granted, any immunity from local jurisdiction which would be implied in a special license.

If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistible, that they enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived by the court for distinguishing their case from that of vessels which enter by express assent. In all the cases of exemption which have been reviewed, much has been implied, but the obligation of what was implied has been found equal to the obligation of that which was expressed. Are there reasons for denying the application of this principle to ships of war?

In this part of the subject a difficulty is to be encountered, the seriousness of which is acknowledged, but which the court will not attempt to evade.

Those treaties which provide for the admission and safe departure of public vessels entering a port from stress of weather, or other urgent cause, provide in like manner for the private vessels of the nation; and where public vessels enter a port under the general license which is implied merely from the absence of a prohibition, they are, it may be urged, in the same condition with merchant vessels entering the same port for the purposes of trade who cannot thereby claim any exemption from the jurisdiction of the country. It may be contended, certainly with much plausibility if not correctness, that the same rule and same principle are applicable to public and private ships; and since it is admitted that private ships entering without special license become subject to the local jurisdiction, it is demanded on what authority an exception is made in favor of ships of war.

It is by no means conceded that a private vessel, really availing herself of an asylum provided by treaty, and not attempting to trade, would become amenable to the local jurisdiction, unless she committed some act forfeiting the protection she claims under compact. On the contrary, motives may be assigned for stipulating and according immunities to vessels in cases of distress, which would not be demanded for or allowed to those which enter voluntarily and for ordinary purposes. On this part of the subject, however, the court does not mean to indicate any opinion. The case itself may possibly occur, and ought not to be prejudged.

Without deciding how far such stipulations in favor of distressed vessels, as are usual in treaties, may exempt private ships from the jurisdiction of the place, it may safely be asserted, that the whole reasoning upon which such exemption has been implied in other cases, applies with full force to the exemption of ships of war in this.

"It is impossible to conceive," says Vattel, "that a prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a foreign power; and this consideration furnishes an additional argument, which completely establishes the independency of a public minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independency; and thus there exists between the two princes a tacit convention, which gives a new force to the natural obligation."

Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked.

To the court it appears, that where, without treaty, the ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.

The preceding reasoning has maintained the propositions that all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that, when implied, its extent must be regulated by the nature of the

case, and the views under which the parties requiring and conceding it must be supposed to act.

When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption.

But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign State. Such interference cannot take place without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and it seems to the court ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rights of hospitality.

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.

Bynkershoek, a jurist of great reputation, has indeed maintained that the property of a foreign sovereign is not distinguishable by any legal exemption from the property of an ordinary individual, and has quoted several cases in which courts have exercised jurisdiction over causes in which a foreign sovereign was made a party defendant.

Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince,

and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force which upholds his crown, and the nation he is entrusted to govern.

The only applicable case cited by Bynkershoek, is that of the Spanish ships of war seized in Flushing for a debt due from the king of Spain. In that case the states-general interposed; and there is reason to believe, from the manner in which the transaction is stated, that, either by the interference of government, or the decision of the court, the vessels were released. This case of the Spanish vessels is, it is believed, the only case furnished by the history of the world, of an attempt made by an individual to assert a claim against a foreign prince, by seizing the armed vessels of the nation. That this proceeding was at once arrested by the government, in a nation which appears to have asserted the power of proceeding in the same manner against the private property of the prince, would seem to furnish no feeble argument in support of the universality of the opinion in favor of the exemption claimed for ships of war. The distinction made in our own laws between public and private ships would appear to proceed from the same opinion.

It seems, then, to the court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, ought not, in the opinion of this court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction.

The arguments in favor of this opinion which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic rather than legal discussion, are of great weight, and merit serious attention. But the argument has already

been drawn to a length which forbids a particular examination of these points.

The principles which have been stated will now be applied to the case at bar.

In the present state of the evidence and proceedings, *The Exchange* must be considered as a vessel which was the property of the libellants, whose claim is repelled by the fact that she is now a national armed vessel, commissioned by, and in the service of the emperor of France. The evidence of this fact is not controverted. But it is contended that it constitutes no bar to an inquiry into the validity of the title, by which the emperor holds this vessel. Every person, it is alleged, who is entitled to property brought within the jurisdiction of our courts, has a right to assert his title in those courts, unless there be some law taking his case out of the general rule. It is therefore said to be the right, and if it be the right, it is the duty of the court, to inquire whether this title has been extinguished by an act, the validity of which is recognized by national or municipal law.

If the preceding reasoning be correct, *The Exchange*, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.

If this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States.

I am directed to deliver it, as the opinion of the court, that the sentence of the circuit court, reversing the sentence of the district court, in the case of *The Exchange* be reversed, and that of the district court, dismissing the libel, be affirmed.

§ 54a. PUBLIC SHIPS

Chung Chi Cheung v. The King

GREAT BRITAIN, JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, 1938

[1939] A. C. 160.

The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal from the judgment of the Full Court of Hong Kong dismissing an appeal by the appellant from his conviction and sentence at a trial in the Supreme Court of Hong Kong before the Chief Justice, MacGregor C. J.,

and a jury. The appellant was convicted of the murder of Douglas Lorne Campbell, and was sentenced to death. The murder was committed on board the Chinese Maritime Customs cruiser *Cheung Keng* while that vessel was in Hong Kong territorial waters. Both the murdered man and the appellant were in the service of the Chinese Government as members of the officers and crew of the cruiser. The former was captain; the appellant was cabin boy. Both were British nationals. At the trial the point was taken that, as the murder took place on an armed public vessel of the foreign Government, the British Court had no jurisdiction in the matter. The contention was overruled by the Chief Justice at the trial, and on appeal his decision was upheld by the Full Court, over which he presided.

In order to elucidate the legal position it will be necessary to make a short statement of the material facts. On January 11, 1937, the accused shot and killed the captain. He then went up the ladder to the bridge and shot at, and wounded, the acting chief officer, and then went below and shot and wounded himself. The acting chief officer, as soon as he was wounded, directed the boatswain to proceed to Hong Kong at full speed and hail the police launch. He wanted, he said, help to arrest the accused from the Hong Kong police. Within a couple of hours the launch of the Hong Kong water police came alongside in answer to the cruiser's signal. The police took the wounded officer and the accused to hospital. They took possession of the two revolvers with which the accused had armed himself, of the spent revolver bullets and expended shells, and of some unexpended cartridges. On February 25 extradition proceedings were commenced against the accused on the requisition of the chairman of the Provincial Government of Kwangtung, alleging murder and attempted murder on board the Chinese Customs cruiser "within the jurisdiction of China while the said cruiser was approximately one mile off Futaumun (British waters)." This appears to be an allegation that the vessel had not at the time reached British territorial waters. The fact that the crime was in reality committed within British waters is not now in dispute. After many adjournments the magistrate decided, on evidence called for the defence, that the accused was a British national, and that the proceedings therefore failed. The accused was at once rearrested and charged with murder "in the waters of this colony," and duly committed. At the hearing before the magistrate, and at the trial, the acting chief officer and three of the crew of the Chinese cruiser were called as witnesses for the prosecution. Police witnesses produced, and gave evidence as to, the revolvers, cartridge cases and bullets. As has already been stated, the accused was convicted and sentenced to death.

On the question of jurisdiction two theories have found favour with persons professing a knowledge of the principles of international law. One is that a public ship of a nation for all purposes either is, or is to be treated

by other nations as, part of the territory of the nation to which she belongs. By this conception will be guided the domestic law of any country in whose territorial waters the ship finds herself. There will therefore be no jurisdiction in fact in any Court where jurisdiction depends upon the act in question, or the party to the proceedings, being done or found or resident in the local territory. The other theory is that a public ship in foreign waters is not, and is not treated as, territory of her own nation. The domestic Courts, in accordance with principles of international law, will accord to the ship and its crew and its contents certain immunities, some of which are well settled, though others are in dispute. In this view, the immunities do not depend upon an objective extritoriality, but on implication of the domestic law. They are conditional, and can in any case be waived by the nation to which the public ship belongs.

Their Lordships entertain no doubt that the latter is the correct conclusion. It more accurately and logically represents the agreements of nations which constitute international law, and alone is consistent with the paramount necessity, expressed in general terms, for each nation to protect itself from internal disorder by trying and punishing offenders within its boundaries. It must be always remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue, they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals. What, then, are the immunities of public ships of other nations accepted by our Courts, and on what principle are they based?

The principle was expounded by that great jurist Chief Justice Marshall in *Schooner Exchange v. M'Faddon*,¹ a judgment which has illumined the jurisprudence of the world. [The résumé of Chief Justice Marshall's opinion is omitted. See § 54 above.—Ed.]

The extreme doctrine of extritoriality was not an issue in *Schooner Exchange v. M'Faddon*,² and neither the principles enunciated by Marshall C. J., nor his application of them, appears to support it. In this country the question arose in acute form in 1875 over instructions issued by the Admiralty to commanders of Her Majesty's ships in respect of the treatment of fugitive slaves. They were attacked by Sir William Vernon Harcourt, then Whewell Professor of International Law at Cambridge and Liberal

¹ 7 Cranch, 116. The footnotes in this document have been renumbered.—Ed.

² 7 Cranch, 116, 143.

M. P. for Oxford, in two letters to *The Times* under the title "Historicus." He there stated, November 4, 1875, that he had seen "with much surprise that the doctrine of the absolute immunity of a public ship, and all persons and things on board of it, from local jurisdiction and the operation of the local law when lying in the territorial waters . . . has been treated as a doubtful proposition. I had certainly supposed that in the whole range of public law there was no position more firmly established by authority, more universally admitted by Governments, or one which had been more completely accepted in the intercourse of States as unquestioned and unquestionable."

The Government appointed a Royal Commission³ to report on the whole question as to the reception of fugitive slaves, which included such eminent lawyers as Sir Alexander Cockburn C. J., Sir Robert Phillimore, Mr. Mountague Bernard, Mr. Justice Archibald, Mr. Alfred Tesiger K. C., Sir Henry Maine, Mr. James Fitzjames Stephen K. C., and Mr. Henry C. Rothery, the Registrar in Admiralty. The lawyers were not agreed as to the doctrine of international law, and the Commission were able to report without expressing any decided opinion about it. The lawyers, however, wrote memoranda which were annexed to the report. Sir Robert Phillimore, Mr. Bernard and Sir Henry Maine appeared to favour the more extreme doctrine, but admitted it must have qualifications. Sir Alexander Cockburn, in a memorandum⁴ which is worthy to be compared with the judgment of Marshall C. J., discussed the whole question of extritoriality of a public ship of war, quoting the authorities from 1740 onwards, and referring to cases of Government action. He quotes Casaregis (1740), *Discursus de Commercio*; Hübner (1759), *De la Saisie des Bâtiments Neutres*; Lampredi; Pinheiro-Ferreira; Azuni; Lord Stowell's advice to the British Government in 1820 in *Brown's* case; Wheaton; *Hautefeuille*, *Des Droits et des Devoirs des Nations Neutres*; Ortolan, *Diplomatie de la Mer*; Bluntschli; Heffter; and Calvo. Of these Hübner, *Hautefeuille*, Ortolan and Calvo support in his view the high doctrine of extritoriality, Casaregis and Wheaton are non-committal, the others are against the doctrine. After controverting the views which favour complete extritoriality, and pointing out the difficulties and, indeed, absurdities, to which the doctrine leads, he says:⁵ "The rule which reason and good sense would, as it strikes me, prescribe, would be that, as regards the discipline of a foreign ship, and offences committed on board as between members of her crew towards one another, matters should be left entirely to the law of the ship, and that should the offender escape to the shore, he should, if

³ 1876 Cd. 1516.

⁴ *Ibid.*, xxviii.

⁵ 1876, Cd. xlii.

taken, be given up to the commander of the ship on demand, and should be tried on shore only if no such demand be made. But if a crime be committed on board the ship upon a local subject, or if, a crime having been committed on shore, the criminal gets on board a foreign ship, he should be given up to the local authorities. In which way the rule should be settled, so important a principle of international law ought not to be permitted to remain in its present unsettled state."

In this passage, which was cited with approval by the Full Court of Hong Kong in the present case, it should be observed that the Lord Chief Justice assumes that even if a crime be committed on board by one member of the crew on another, should the offender escape to shore and no demand be made for his return, the territorial Court would have jurisdiction. Their Lordships doubt whether, when he is dealing with the case of a crime committed on board on a local subject, he has present to his mind the possibility of the local subject being a member of the crew. And while he says that in the cases put the offender should be given up to the local authorities, he does not say whether, if surrender were refused, judicial process could be directed to the captain of the foreign vessel to secure the custody of the offender by the local authority. In the memorandum of Sir Alexander Cockburn, Mr. Justice Archibald concurred. Mr. Stephen wrote a memorandum to the same effect in the trenchant Stephen style. Mr. Rothery treated the dogmatic assertion of "Historicus" and his authorities to a merciless dissection to which the conclusions of a Whewell Professor can seldom have been subjected. In addition to the authorities already mentioned, reference should be made to the passages cited in the judgment of the Supreme Court in this case from Hall's *International Law*, 8th ed., 1924, edited by Professor Pearce Higgins, para. 55. There the author states that a public vessel is exempt from the territorial jurisdiction; but that her crew and persons on board of her cannot ignore the laws of the country in which she is lying as if she were a territorial enclave. Exceptions to their obligation exist in the case of acts beginning and ending on board the ship, and taking no effect externally to her, in all matters in which the economy of the ship, or the relations of persons on board to each other, are exclusively concerned. The author appends a note:⁶ "The case which, however, would be extremely rare on board a ship of war, of a crime committed by a subject of the state within which the vessel is lying against a fellow subject, would no doubt be an exception to this. It would be the duty of the captain to surrender the criminal."

The other passage is from Oppenheim's *International Law*, 5th ed., 1937, edited by Professor Lauterpacht, vol. i., para. 450. The author adopts

⁶ Note 2, p. 245.

the full extritorial view: "The position of men-of-war in foreign waters is characterised by the fact that they are called 'floating portions of the flag-State.' For at the present time there is a customary rule of international law, universally recognised, that the State owning the waters into which foreign men-of-war enter must treat them in every point as though they were floating portions of their flag-State." When, however, he is dealing with the analogous immunities of diplomatic envoys, para. 389, he says "extritoriality, in this as in every other case, is a fiction only, for diplomatic envoys are in reality not without, but within, the territories of the receiving States." There is a note⁷ that "the modern tendency among writers is towards rejecting the fiction of extritoriality," a note which is not in the 2nd edition, the last prepared by the author, and appears for the first time in the 4th edition, edited by Professor McNair.

Their Lordships have no hesitation in rejecting the doctrine of extritoriality expressed in the words of Mr. Oppenheim, which regards the public ship "as a floating portion of the flag-State." However the doctrine of extritoriality is expressed, it is a fiction, and legal fictions have a tendency to pass beyond their appointed bounds and to harden into dangerous facts. The truth is that the enunciators of the floating island theory have failed to face very obvious possibilities that make the doctrine quite impracticable when tested by the actualities of life on board ship and ashore. Immunities may well be given in respect of the conduct of members of the crew to one another on board ship. If one member of the crew assault another on board, it would be universally agreed that the local Courts would not seek to exercise jurisdiction, and would decline it unless, indeed, they were invited to exercise it by competent authority of the flag-nation. But if a resident in the receiving State visited the public ship and committed theft, and returned to shore, is it conceivable that, when he was arrested on shore, and shore witnesses were necessary to prove dealings with the stolen goods and identify the offender, the local Courts would have no jurisdiction? What is the captain of the public ship to do? Can he claim to have the local national surrendered to him? He would have no claim to the witnesses, or to compel their testimony in advance, or otherwise. He naturally would leave the case to the local Courts. But on this hypothesis the crime has been committed on a portion of foreign territory. The local Court then has no jurisdiction, and this fiction dismisses the offender untried and untriable. For it is a commonplace that a foreign country cannot give territorial jurisdiction by consent. Similarly, in the analogous case of an embassy. Is it possible that the doctrines of international law are so rigid that a local burglar who has broken and entered a foreign embassy and, having completed his crime, is arrested in his own country, cannot be tried

⁷ Note 3, p. 620.

in the Courts of the country? It is only necessary to test the proposition to assume that the foreign country has assented to the jurisdiction of the local Courts. Even so, objective extritoriality would, for the reason given above, deprive our Courts at any rate of any jurisdiction in such a case. The result of any such doctrine would be not to promote the power and dignity of the foreign sovereign, but to lower them by allowing injuries committed in his public ships or embassies to go unpunished.

On this topic, their Lordships agree with the remarks made by Professor Brierly in *The Law of Nations* (1928), p. 110: "The term 'extritoriality' is commonly used to describe the status of a person or thing physically present in a State's territory, but wholly or partly withdrawn from that State's jurisdiction by a rule of international law, but for many reasons it is an objectionable term. It introduces a fiction, for the person or thing is in fact within, and not outside, the territory: it implies that jurisdiction and territory always coincide, whereas they do so only generally; and it is misleading because we are tempted to forget that it is only a metaphor, and to deduce untrue legal consequences from it as though it were a literal truth. At most it means nothing more than that a person or thing has some immunity from the local jurisdiction; it does not help us to determine the only important question, namely, how far this immunity extends."

The true view is that, in accordance with the conventions of international law, the territorial sovereign grants to foreign sovereigns and their envoys, and public ships and the naval forces carried by such ships, certain immunities. Some are well settled; others are uncertain. When the local Court is faced with a case where such immunities come into question, it has to decide whether in the particular case the immunity exists or not. If it is clear that it does, the Court will of its own initiative give effect to it. The sovereign himself, his envoy, and his property, including his public armed ships, are not to be subjected to legal process. These immunities are well settled. In relation to the particular subject of the present dispute, the crew of a warship, it is evident that the immunities extend to internal disputes between the crew. Over offences committed on board ship by one member of the crew upon another, the local Courts would not exercise jurisdiction. The foreign sovereign could not be supposed to send his vessel abroad if its internal affairs were to be interfered with, and members of the crew withdrawn from its service, by local jurisdiction. What are the precise limits of the immunities it is not necessary to consider. Questions have arisen as to the exercise of jurisdiction over members of a foreign crew who commit offences on land. It is not necessary for their Lordships to consider these. In the present case, the question arises as to the murder of one officer, and the attempted murder of another, by a member of the crew. If nothing more arose, the Chinese Government could clearly have

had jurisdiction over the offence; and, though the offender had, for reasons of humanity, been taken to a local hospital, a diplomatic request for his surrender would appear to have been in order. It is difficult to see why the fact that either the victim or the offender, or both, are local nationals, should make a difference if both are members of the crew. But this request was never made. The only request was for extradition, which is based upon treaty and statutory rights, and in the circumstances inevitably failed. But if the principles which their Lordships have been discussing are accepted, the immunities which the local Courts recognize flow from a waiver by the local sovereign of his full territorial jurisdiction, and can themselves be waived. The strongest instances of such waiver are the not infrequent cases where a sovereign has, as it is said, submitted to the jurisdiction of a foreign Court over his rights of property. Here is no question of saying you may treat an offence committed on my territory as committed on yours. Such a statement by a foreign sovereign would count for nothing in our jurisprudence. But a sovereign may say, you have waived your jurisdiction in certain cases, but I prefer in this case that you should exercise it. The original jurisdiction in such a case flows afresh.

Applying these considerations to the present case, it appears to their Lordships as plain as possible that the Chinese Government, once the extradition proceedings were out of the way, consented to the British Court exercising jurisdiction. It is not only that with full knowledge of the proceedings they made no further claim, but at two different dates they permitted four members of their service to give evidence before the British Court in aid of the prosecution. That they had originally called in the police might not be material if, on consideration, they decided to claim jurisdiction themselves. But the circumstances stated, together with the fact that the material instruments of conviction, the revolver bullets, etc., were left without demur in the hands of the Hong Kong police, make it plain that the British Court acted with the full consent of the Chinese Government. It therefore follows that there was no valid objection to the jurisdiction, and the appeal fails. There was a further point raised by the Crown as to the possible effect of the Treaty of Tien-tsin in 1858, in renouncing jurisdiction by Chinese over British subjects who committed crimes in China. The Supreme Court was prepared to decide in favour of the Crown on this point also, but, in view of the opinion already expressed on the main point, it is unnecessary to decide this, and no opinion is expressed upon it. For the above reasons their Lordships will humbly advise His Majesty that this appeal be dismissed.

§ 55. STATE-OWNED SHIPS ENGAGED IN TRADE

Berizzi Brothers Company v. S. S. Pesaro

SUPREME COURT OF THE UNITED STATES, 1926

271 U. S. 562.

APPEAL from a decree of the District Court in admiralty dismissing a libel *in rem* against a ship owned, possessed, and operated for trade purposes by the Italian Government, for want of jurisdiction. See 277 Fed. 473. [The arguments of counsel are omitted.]

Mr. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This was a libel *in rem* against the steamship "Pesaro" on a claim for damages arising out of a failure to deliver certain artificial silk accepted by her at a port in Italy for carriage to the port of New York. The usual process issued, on which the vessel was arrested; and subsequently she was released, a bond being given for her return, or the payment of the libellant's claim, if the court had jurisdiction and the claim was established. In the libel the vessel was described as a general ship engaged in the common carriage of merchandise for hire. The Italian Ambassador to the United States appeared and on behalf of the Italian Government specially set forth that the vessel at the time of her arrest was owned and possessed by that government, was operated by it in its service and interest; and therefore was immune from process of the courts of the United States. At the hearing it was stipulated that the vessel when arrested was owned, possessed and controlled by the Italian Government, was not connected with its naval or military forces, was employed in the carriage of merchandise for hire between Italian ports and ports in other countries, including the port of New York, and was so employed in the service and interest of the whole Italian nation as distinguished from any individual member thereof, private or official; and that the Italian Government never had consented that the vessel be seized or proceeded against by judicial process. On the facts so appearing the court sustained the plea of immunity and on that ground entered a decree dismissing the libel for want of jurisdiction. This direct appeal is from that decree and was taken before the Act of February 13, 1925, became effective.

The single question presented for decision by us is whether a ship owned and possessed by a foreign government, and operated by it in the carriage of merchandise for hire, is immune from arrest under process based on a libel *in rem* by a private suitor in a federal district court exercising admiralty jurisdiction.

This precise question never has been considered by this Court before.

Several efforts to present it have been made in recent years, but always in circumstances which did not require its consideration. The nearest approach to it in this Court's decisions is found in *The Exchange*, 7 Cranch 116 . . .

[In an omitted part the court quoted the opinion in *Schooner Exchange v. M'Faddon*, above, § 54.]

It will be perceived that the opinion, although dealing comprehensively with the general subject, contains no reference to merchant ships owned and operated by a government. But the omission is not of special significance, for in 1812, when the decision was given, merchant ships were operated only by private owners and there was little thought of governments engaging in such operations. That came much later.

The decision in *The Exchange* therefore cannot be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles, they must be held to have the same immunity as war ships, in the absence of a treaty or statute of the United States evincing a different purpose. No such treaty or statute has been brought to our attention.

We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.

The subsequent course of decision in other courts gives strong support to our conclusion.

In *Briggs v. Light Boats*, 11 Allen 157, there was involved a proceeding against three vessels to subject them to a lien and to satisfy it through their seizure and sale. The boats had been recently acquired by the United States and were destined for use as floating lights to aid navigation. Whether their ownership and intended use rendered them immune from such a proceeding and seizure was the principal question. In answering it in the affirmative the state court, speaking through Mr. Justice Gray, afterwards a member of this Court, said (p. 163): "These vessels were not held by the United States, as property might perhaps be held by a monarch, in a private or personal, rather than in a public or political character. . . . They were, in the precise and emphatic language of the plea to the jurisdiction, held and owned by the United States for public uses." And again (p. 165): "The immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty;

and does not depend on the extent or manner of their actual use at any particular moment, but on the purpose to which they are devoted."

In *The Parlement Belge*, L. R. 5 P. D. 197, the question was whether a vessel belonging to Belgium and used by that government in carrying the mail and in transporting passengers and freight for hire could be subjected to a libel *in rem* in the admiralty court of Great Britain. The Court of Appeal gave a negative answer and put its ruling on two grounds, one being that the vessel was public property of a foreign government in use for national purposes. After reviewing many cases bearing on the question, including *The Exchange*, the court said:

"The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

Sometimes it is said of that decision that it was put on the ground that a libel *in rem* under the British admiralty practice is not a proceeding solely against property, but one directly or indirectly impleading the owner—in that instance the Belgian Government. But this latter was given as an additional and independent ground, as is expressly stated in the opinion at page 217.

The ruling in that case has been consistently followed and applied in England from 1880, when it was made, to the present day. *Young v. The Scotia*, 1903 A. C. 501; *The Jassy*, L. R. 1906, P. D. 270; *The Gagara*, L. R. 1919, P. D. 95; *The Porto Alexandre*, L. R. 1920, P. D. 30; *The Jupiter*, L. R. 1924, P. D. 236.

In the lower federal courts there has been some diversity of opinion on the question, but the prevailing view has been that merchant ships owned and operated by a foreign government have the same immunity that warships have. Among the cases so holding is *The Maipo*, 252 Fed. 627, and 259 Fed. 367. The principal case announcing the other view is *The Pesaro*, 277 Fed. 473. That was a preliminary decision in the present case, but it is not the one now under review, which came later and was the other way.

We conclude that the general words of section 24, clause 3, of the Judicial Code investing the district courts with jurisdiction of "all civil causes of admiralty and maritime jurisdiction" must be construed, in keeping with the last paragraph before quoted from *The Exchange*, as not intended to

include a libel *in rem* against a public ship, such as the "Pesaro," of a friendly foreign government. It results from this that the court below rightly dismissed the libel for want of jurisdiction.

Decree affirmed.

§ 56. IMMUNITY OF STATE-OWNED SHIPS—IMMUNITY OF STATE AGENCIES ENGAGED IN TRADE

NOTE BY THE EDITOR

If the Attorney General certifies to a federal court the foreign public ownership, it is the duty of the court to release the vessel. *The Cassius*, 2 Dall. 365. But where the only official attitude taken by the executive departments is a suggestion to the Ambassador of the State claiming ownership that he may appear directly before the court, the court is not bound to accept the Ambassador's suggestion of State ownership without judicial investigation of the title. In the case of the *Navemar*¹ the United States Supreme Court upheld the action of the District Court in releasing a ship claimed to be of Spanish ownership under such circumstances when the District Court's investigation showed that the *Navemar* had never been reduced to possession by the Spanish Government. This case and that of the *U. S. v. Deutsches Kalisyndikat Gesellschaft*, discussed below, may properly raise the following questions: (1) Are the executive departments now disposed more than previously to turn over the whole question of State ownership to the courts? (2) Are the courts willing generally, if such freedom is allowed by the executive, to examine in each case the facts as to the character of the ownership, and decide accordingly? Affirmative answers would imply a substantial development in the law, and probably a considerable subjection of State-controlled property to suit.

The following provisions formed part of a Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, signed at Brussels, April 10, 1926:

ARTICLE I. Seagoing vessels owned or operated by States, cargoes owned by them, and cargoes and passengers carried on Government vessels, and the States owning or operating such vessels, or owning such cargoes, are subject in respect of claims relating to the operation of such vessels or the carriage of such cargoes, to the same rules of liability and to the same obligations as those applicable to private vessels, cargoes and equipments. Art. 2. For the enforcement of such liabilities and obligations there shall be the same rules concerning the jurisdiction of tribunals, the same legal actions, and the same procedure as in the case of privately-owned merchant vessels and cargoes and of their owners. Art. 3. § 1. The

¹(1938), 58 S. Ct. 432.

provisions of the two preceding articles shall not be applicable to ships of war, Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by a State, and used at the time a cause of action arises exclusively on Governmental and non-commercial service, and such vessels shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings in rem. Nevertheless, claimants shall have the right of taking proceedings in the competent tribunals of the State owning or operating the vessel, without that State being permitted to avail itself of its immunity: (1) In case of actions in respect of collision or other accidents of navigation; (2) In case of actions in respect of assistance, salvage and general average; (3) In case of actions in respect of repairs, supplies, or other contracts relating to the vessel. § 2. The same rules shall apply to State-owned cargoes carried on board the vessels hereinabove mentioned. . . .²

This Convention came into force January 8, 1937, between Belgium, Brazil, Chile, Estonia, Hungary, Netherlands and Poland. Germany, Italy, Rumania and Mexico are also parties.³

The doctrine that State-owned property is exempt from the jurisdiction of the courts is still generally applied, but its results when applied to State property used in what are regarded essentially as private business enterprises by the State of the forum are being criticized, and there are some indications that courts are finding methods of whittling down the exemption in such cases.

In 1898 the Supreme Judicial Court of Massachusetts dismissed an action to recover damages for injuries against the Intercolonial Railway of Canada, on the ground that the railway was the property of King Edward VII. "The doctrine that the courts have no jurisdiction to proceed with a suit against the sovereign of another State is established in England in numerous decisions. It applies to all proceedings against the public property of such a sovereign." The railway was not a corporation; and no subject, private individual, or corporation had an interest of property or direction in it.⁴ The United States Supreme Court denied *certiorari* on a judgment of the Circuit Court of Appeals⁵ which refused execution against the property of the Royal Administration of the Swedish State Railways. The railways were owned solely by Sweden, but the Swedish Government, representing the Railway Administration to be a corporation, submitted

² Text from Hudson, *International Legislation*, III, 1837, 1840-1841.

³ On the immunity of State-owned ships, see *The Ice King* (Germany, 1921) 103 *Entscheidungen des Reichsgericht in Zivilsachen*, 274, translated in Hudson, *Cases*, 2d Ed., p. 532; E. D. Dickinson, "The Immunity of Public Ships Employed in Trade," 21 *A.J.I.L.* (1927), 168; J. W. Garner, "Immunities of State-Owned Ships Employed in Commerce,"

6 *B.Y.I.L.* (1925), 128; *Report of League of Nations Committee of Experts*, "Legal Status of Government Ships Employed in Commerce," *League of Nations Document C. 52. M. 29. 1926. V.*, reprinted in 20 *A.J.I.L.* (Spec. Supp., 1926), 260.

⁴ *Mason v. Intercolonial Railway of Canada*, 197 Mass. 349.

⁵ *Dexter and Carpenter v. Kunglig Järnvägsstyrelsen* (1930), 43 F. (2d) 705.

to the jurisdiction of the District Court, and entered no plea of immunity until after judgment against it, when the plaintiff applied for execution. But "the clear weight of authority, in this country, as well as that of England and Continental Europe, is against all seizures, even though a valid judgment has been entered. . . . It is hoped that the judgment of our courts will be respected and payment made by the Swedish Government. But we are required to affirm the order appealed from."⁶ Sweden did pay \$150,000 subsequently, as a result of diplomatic negotiations. In 1923 the Court of Appeals of Kentucky held that tobacco, the property of the French Government's tobacco monopoly, could not be taxed. "It is conceded that the French Republic is not suable in our courts without its consent, and that the tobacco itself cannot be subjected to the payment of the tax. Therefore, if the assessment be upheld, we have no way of collecting the tax. We can neither negotiate or declare war. All that we can do is to ask the State Department to open international negotiations, or persuade Congress to declare war, for the purpose of collecting the tax, thus presenting a state of helplessness wholly at variance with the sovereign right of taxation." Quoting from *The Schooner Exchange v. M'Faddon*, *supra*, the court resumed: "If one nation enters the territory of another with its consent, for the purpose of mutual intercourse, it does so with the implied understanding that it does not intend to degrade its dignity by placing itself or its sovereign rights under the jurisdiction of the other, and we know of nothing more calculated to degrade the dignity of an independent nation than for another to attempt to exercise over it the sovereign right of taxation." The court was "not disposed to make our views of government the yardstick by which to measure the character of a foreign sovereignty. If that sovereignty deems it a proper governmental function to engage in trade for the purpose of maintaining its government, we shall not question its decision that the property so employed is owned in a public and not a private capacity."⁷

The dissatisfaction which is felt with this situation in many quarters finds judicial expression in *United States v. Deutsches Kalisyndikat Gesellschaft* (1929), 31 F. (2nd) 199. In this case the Federal District Court refused to set aside service of process upon the *Société Commerciale des Potasses d'Alsace*, in an action by the United States to enjoin violations of the antitrust laws. The *Société* was described by the French Ambassador, who intervened, as an organization created and controlled by the Republic

⁶ *Ibid.*, pp. 708, 710.

⁷ *French Republic v. Board of Supervisors of Jefferson County* (1923) 200 Kv. 18, 21-22. See also *Mighell v. Sultan of Johore* (1893), L. R. (1894) 1 Q. B. 149 (immunity of personal sovereign from summons in an action for breach of promise of marriage); *Vavasseur v. Krupp* (1878) 9 Ch. D. 351 (shells and projectiles the property of the Mikado of Japan); *Matsuyama and Sano v. Republic of China*, Supreme Court of Japan, 1928, reported in *Annual Digest*, 1927-1928, p. 168 (immunity of foreign State from suit on contract debt).

of France for the purpose of administering, and selling the products of, potash mines, eleven-fifteenths of the stock being owned by the French government. Receipts from the sale of the potash went into the revenue of the government and were used for governmental purposes. The court, however, insisted that the *Société* was a corporation, whose French charter specifically provided that it might be sued. "A suit against a corporation is not a suit against a government merely because it has been incorporated by direction of the government, and is used as a governmental agent, and its stock is owned solely by the government. See . . . *Federal Sugar Refining Co. v. U. S. Sugar Equalization Board* (D. C.) 268 F. 575; *Sloan Shipyards Corporation v. U. S. Shipping Board Emergency Fleet Corporation*, 258 U.S. 549; *United States v. Strang*, 254 U.S. 491. The only difference between the defendants and other foreign corporations and their officers and agents doing business in the United States is that the French Republic owns a part of the stock of the defendant corporation, and that the defendant company and its agents are selling potash for the French government as well as for others. As appears by affidavit and without contradiction, the French courts do not extend immunity to commercial enterprises owned or controlled by a sovereign State, and suits can be brought and judgments recovered in France, Italy, and Belgium against a government engaging in business. Affidavit of Rodriguez Barteault (p. 202.)." There seems to be little doubt, however, that the court was seriously influenced by other considerations. The United States Secretary of State had not communicated with the court, though the suit had been brought to his attention by the Ambassador; and the Attorney General, who had brought the suit, produced a letter from the Secretary of State to the effect that it had "long been the view of the Department of State that agencies of foreign governments engaged in ordinary commercial transactions in the United States enjoy no privileges or immunities not appertaining to other foreign corporations, agencies, or individuals doing business here and that they should conform to the laws of this country governing such transactions, and that none of the French defendants has any consular or diplomatic status in this country."

Certain States do permit the jurisdiction of the courts over foreign States regarded in their capacity as a civil person and not as a sovereign. See especially *Homspohn John v. Bey of Tunis*, Court of Lucca, Italy (1887), reported in 16 *Clunet*, 335; *Rumanian State v. Pascalet and Co.*, Tribunal of Commerce, Marseilles, France (1924), reported in 52 *Clunet* 111; *Rau v. Duruty*, Court of Ghent, Belgium (1879), reported in 8 *Clunet* 82; *Rumanian Bank of Commerce v. Poland*, Tribunal of Commerce of Ilfov, Rumania 1920), 19 *R.D.I. Privé* 581.⁸ A good statement of the ra-

⁸ All these cases are reprinted in English in Scott and Jaeger, *Cases*, pp. 423-428.

tionale of these cases is to be found in *Rumanian State v. Pascalet and Co.*, cited:

It is alleged that foreign states have immunity from jurisdiction within the territory of the Republic; the modern doctrine, however, as jurisprudence completely established, is that acts of a state of a purely private character, resulting from a private contract and having no relation to the exercise of a public power, fall within the application of the rules of municipal law and are subject to the ordinary jurisdiction of the courts. In international law it cannot be otherwise when it is a matter of acts committed entirely outside of all questions of sovereignty or independence, the contracts being made as they would have been made by a private person. In this instance, the Rumanian Government purchased goods for purposes of resale to its nationals under conditions which gave the transaction a purely commercial character. . . .

In its Draft Convention on the Competence of National Courts, the Harvard Law School Research in International Law recommends a drastic whittling down of the immunity of State agencies from suit. If a State appears in any proceeding on the merits of a cause; or if, by its own contract, its own legislation, or by treaty, it has bound itself to the acceptance of the jurisdiction of the courts of the foreign forum, it may properly be made a respondent (Article 8). A foreign State may also be made a respondent in proceedings relating to its interests in immovable property in the State of the forum (Article 9), the conduct there of "industrial, commercial, financial, or other business enterprises in which private persons may there engage" (Article 11), or its interest as shareholder in a corporation organized under the laws of the State of the forum (Article 12).⁹ These provisions are not, of course, to be regarded as accepted international law.

On the whole subject of immunities of State property the materials in the Harvard Law School Research in International Law, "Competence of Courts in Regard to Foreign States,"¹⁰ are indispensable.

§ 57. TREATY EXCEPTIONS FROM JURISDICTION

The S.S. Wimbledon

PERMANENT COURT OF INTERNATIONAL JUSTICE, 1923

Publications, Permanent Court of International Justice, Series A,
No. 1, pp. 21 ff.

[On March 21, 1921, the German authorities refused the British steamship "Wimbledon" access to the Kiel Canal. The "Wimbledon" had been chartered by a French armaments firm, and was proceeding to Danzig

⁹ 26 *A.J.I.L.* (Supp., 1932), 572, 597, 641.

¹⁰ 26 *A.J.I.L.* (Supp., 1932), 451-738.

with a cargo of war materials destined for Poland, which State was at the time engaged in a war with Russia. The British, French, Italian, and Japanese Governments filed suit against the German Government before the World Court, alleging that the act of the German Government contravened its obligations under Article 380 of the Treaty of Versailles. Germany contended that her obligations as a neutral in the war between Poland and Russia obliged her to prevent the passage of the "Wimbledon" through the Kiel Canal. The Court's statement of the case, Parts I-III of the Court's Judgment, and the separate opinions of Judges Anzilotti and Huber and National Judge Schücking, are omitted.]

[By the Court:] . . .

IV

THE LAW

A

The question upon which the whole case depends is whether the German authorities were entitled to refuse access to and passage through the Kiel Canal to the S.S. "Wimbledon" on March 21st, 1921, under the conditions and circumstances in which they did so.

The reply to this question must be sought in the provisions devoted by the Peace Treaty of Versailles to the Kiel Canal, in Part XII, entitled "Ports, Waterways and Railways," Section VI. This Section commences with a provision of a general and peremptory character, contained in Article 380, which is as follows:

"The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality."

Then follow various provisions intended to facilitate and regulate the exercise of this right of free passage.

Article 381, after mentioning that "the nationals, property and vessels of all Powers, shall, in respect of charges, facilities, and in all other respects, be treated on a footing of perfect equality in the use of the canal . . .," adds that "no impediment shall be placed on the movement of persons or vessels other than those arising out of police, customs, sanitary, emigration or immigration regulations, and those relating to the import and export of prohibited goods, and that such regulations must be reasonable and uniform and must not unnecessarily impede traffic."

Again, Article 382 forbids the levying of charges upon vessels using the canal or its approaches other than those intended to cover, in an equitable manner, the cost of maintaining in a navigable condition, or of improving, the canal or its approaches, or to meet expenses incurred in the interests

of navigation; furthermore, Article 383 provides for the placing of goods in transit under seal or in the custody of customs agents, and Article 385 places Germany under the obligation to take all suitable measures to remove any obstacle or danger to navigation and to ensure the maintenance of good conditions of navigation, whilst, at the same time, forbidding Germany to undertake any works of a nature to impede navigation on the canal or its approaches.

The claim advanced by the Applicants, that the S.S. "Wimbledon" should have enjoyed the right of free passage through the Kiel Canal, is based on the general rule embodied in Article 380 of the Treaty of Versailles.

This clause, they say, could not be more clear as regards the provision to the effect that the canal shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany; it follows therefore, that the S.S. "Wimbledon," belonging to a nation at that moment at peace with Germany, was entitled to free passage through the Canal.

The Applicants have also maintained that this interpretation of Article 380 is confirmed by the terms of paragraph 2 of the following Article, providing for certain restrictions or impediments which may be placed by the German Government upon free movement in the canal, since none of these restrictions or impediments, which are enumerated exclusively, can be applied to the S.S. "Wimbledon" by reason of the nature of her cargo.

The Court considers that the terms of Article 380 are categorical and give rise to no doubt. It follows that the canal has ceased to be an internal and national navigable waterway, the use of which by the vessels of states other than the riparian state is left entirely to the discretion of that state, and that it has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world. Under its new régime, the Kiel Canal must be open, on a footing of equality, to all vessels, without making any distinction between war vessels and vessels of commerce, but on one express condition, namely, that these vessels must belong to nations at peace with Germany.

The right of the Empire to defend herself against her enemies by refusing to allow their vessels to pass through the canal is therefore proclaimed and recognised. In making this reservation in the event of Germany not being at peace with the nation whose vessels of war or of commerce claim access to the canal, the Peace Treaty clearly contemplated the possibility of a future war in which Germany was involved. If the conditions of access to the canal were also to be modified in the event of a conflict between two Powers remaining at peace with the German Empire, the Treaty would not have failed to say so. It has not said so and this omission was no doubt intentional.

The intention of the authors of the Treaty of Versailles to facilitate

access to the Baltic by establishing an international régime, and consequently to keep the canal open at all times to foreign vessels of every kind, appears with still greater force from a comparison of the wording of Article 380 with that of the other provisions to be found in Part XII.

Although the Kiel Canal, having been constructed by Germany in German territory, was, until 1919, an internal waterway of the state holding both banks, the Treaty has taken care not to assimilate it to the other internal navigable waterways of the German Empire. A special section has been created at the end of Part XII, dealing with ports, waterways and railways, and in this special section rules exclusively designed for the Kiel Canal have been inserted; these rules differ on more than one point from those to which other internal navigable waterways of the Empire are subjected by Articles 321 to 327. This difference appears more especially from the fact that the Kiel Canal is open to the war vessels and transit traffic of all nations at peace with Germany, whereas free access to the other German navigable waterways referred to above is limited to the Allied and Associated Powers alone. This comparison furnishes a further argument with regard to the construction of Article 380, over and above those already deduced from its letter and spirit.

The provisions relating to the Kiel Canal in the Treaty of Versailles are therefore self-contained; if they had to be supplemented and interpreted by the aid of those referring to the inland navigable waterways of Germany in the previous Sections of Part XII, they would lose their "raison d'être," such repetitions as are found in them would be superfluous and there would be every justification for surprise at the fact that, in certain cases, when the provisions of Articles 321 to 327 might be applicable to the canal, the authors of the Treaty should have taken the trouble to repeat their terms or re-produce their substance.

The idea which underlies Article 380 and the following articles of the Treaty is not to be sought by drawing an analogy from these provisions but rather by arguing *a contrario*, a method of argument which excludes them.

In order to dispute, in this case, the right of the S.S. "Wimbledon" to free passage through the Kiel Canal under the terms of Article 380, the argument has been urged upon the Court that this right really amounts to a servitude by international law resting upon Germany and that, like all restrictions or limitations upon the exercise of sovereignty, this servitude must be construed as restrictively as possible and confined within its narrowest limits, more especially in the sense that it should not be allowed to affect the rights consequent upon neutrality in an armed conflict. The Court is not called upon to take a definite attitude with regard to the question, which is moreover of a very controversial nature, whether in the domain of

international law, there really exist servitudes analogous to the servitudes of private law. Whether the German Government is bound by virtue of a servitude or by virtue of a contractual obligation undertaken towards the Powers entitled to benefit by the terms of the Treaty of Versailles, to allow free access to the Kiel Canal in time of war as in time of peace to the vessels of all nations, the fact remains that Germany has to submit to an important limitation of the exercise of the sovereign rights which no one disputes that she possesses over the Kiel Canal. This fact constitutes a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such a limitation. But the Court feels obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted.

The argument has also been advanced that the general grant of a right of passage to vessels of all nationalities through the Kiel Canal cannot deprive Germany of the exercise of her rights as a neutral power in time of war, and place her under an obligation to allow the passage through the canal of contraband destined for one of the belligerents; for, in this wide sense, this grant would imply the abandonment by Germany of a personal and imprescriptible right, which forms an essential part of her sovereignty and which she neither could nor intended to renounce by anticipation. This contention has not convinced the Court; it conflicts with general considerations of the highest order. It is also gainsaid by consistent international practice and is at the same time contrary to the wording of Article 380 which clearly contemplates time of war as well as time of peace. The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.

As examples of international agreements placing upon the exercise of the sovereignty of certain states restrictions which though partial are intended to be perpetual, the rules established with regard to the Suez and Panama Canals were cited before the Court. These rules are not the same in both cases; but they are of equal importance in that they demonstrate that the use of the great international waterways, whether by belligerent men-of-war, or by belligerent or neutral merchant ships carrying contraband, is not regarded as incompatible with the neutrality of the riparian sovereign.

By the Convention of Constantinople of October 29th, 1888 the Governments of Austria-Hungary, France, Germany, Great Britain, Italy, Holland,

Russia, Spain and Turkey, declared, on the one hand, that the Suez Maritime Canal should "always be free and open, in time of war as in time of peace, to every vessel of commerce or of war without distinction of flag" including even the vessels of countries at war with Turkey, the territorial sovereign, and on the other hand, that they would not in any way "interfere with the free use of the canal, in time of war as in time of peace," the right of self-defence on the part of the territorial sovereign being nevertheless reserved up to a certain point; no fortifications commanding the canal may be erected. In fact under this régime belligerent men-of-war and ships carrying contraband have been permitted in many different circumstances to pass freely through the Canal; and such passage has never been regarded by anyone as violating the neutrality of the Ottoman Empire.

For the régime established at Panama, it is necessary to consult the Treaty between Great Britain and the United States of November 18th, 1901, commonly called the Hay-Pauncefote Treaty, and the Treaty between the United States and the Republic of Panama of November 18th, 1903. In the former, while there are various stipulations relating to the "neutralisation" of the Canal, these stipulations being to a great extent declaratory of the rules which a neutral State is bound to observe, there is no clause guaranteeing the free passage of the canal in time of war as in time of peace without distinction of flag and without reference to the possible belligerency of the United States, nor is there any clause forbidding the United States to erect fortifications commanding the Canal. On the other hand, by the Treaty of November 18th, 1903, the Republic of Panama granted to the United States "in perpetuity the use, occupation and control" of a zone of territory for the purposes of the canal, together with the use, occupation and control in perpetuity of any lands and waters outside the zone which might be necessary and convenient for the same purposes; and further granted to the United States in such zone and in the auxiliary lands and waters "all the rights, power and authority . . . which the United States would possess and exercise if it were the sovereign of the territory . . . to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority." The Treaty further conceded to the United States the right to police the specified lands and waters with its land and naval forces "and to establish fortifications for these purposes." In view of these facts, it will be instructive to consider the view which the United States and the nations of the world have taken of the rights and the liabilities of the United States as the builder and owner of the Panama Canal exercising, subject always to the stipulations of existing treaties, sovereign powers and exclusive jurisdiction over the Canal and the auxiliary territory and waters.

By the Proclamation issued by the President of the United States on

November 13th, 1914, for the regulation of the use of the Panama Canal and its approaches in the world war, express provision was made for the passage of men-of-war of belligerents as well as of prizes of war, and no restriction whatever was placed upon the passage of merchant ships of any nationality carrying contraband of war. But, by the Proclamation of May 23rd, 1917, issued after the entrance of the United States into the war, the use of the canal by ships, whether public or private, of an enemy or the allies of an enemy, was forbidden, just as, by Article 380 of the Treaty of Versailles, the Kiel Canal is closed to the vessels of war and of commerce of nations not at peace with Germany.

In the Proclamation of May 23rd, 1917, the carriage of contraband is not mentioned; but, by the Proclamation of December 3rd, 1917, issued under the Act of Congress of June 15th, 1917, the Secretary of the Treasury was authorised to make regulations governing the movement of vessels in territorial waters of the United States; and by a subsequent Executive Order, issued under the same law, the Governor of the Panama Canal was authorised to exercise within the territory and waters of the canal the same powers as were conferred by the law upon the Secretary of the Treasury. By a Proclamation of August 27th, 1917, it was made unlawful to take munitions of war out of the United States or its territorial possessions to its enemies without licence.

It has never been alleged that the neutrality of the United States, before their entry into the war, was in any way compromised by the fact that the Panama Canal was used by belligerent men-of-war or by belligerent or neutral merchant vessels carrying contraband of war.

The precedents therefore afforded by the Suez and Panama Canals invalidate in advance the argument that Germany's neutrality would have necessarily been imperilled if her authorities had allowed the passage of the "Wimbledon" through the Kiel Canal, because that vessel was carrying contraband of war consigned to a state then engaged in an armed conflict. Moreover they are merely illustrations of the general opinion according to which when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie.

The next question to be considered is whether Germany was entitled to invoke her rights and duties as a neutral power and the provisions of her Neutrality Orders issued in connection with the Russo-Polish war as a ground for her refusal to allow the "Wimbledon" to enter the Kiel Canal, in spite of the categorical terms of Article 380 of the Treaty of Versailles.

The first of the Orders above mentioned dated July 25th, 1920, contains the following:

In consequence of Germany's neutrality in the war which has arisen between the Republic of Poland and the Federal Socialist Republic of the Russian Soviets . . . the Government enacts as follows:

Article I: The export and transit of arms, munitions, powder and explosives and other articles of war material is prohibited in so far as these articles are consigned to the territories of the Polish Republic or of the Federal Socialist Republic of the Russian Soviets.

A detailed list of the substances and articles, the export and transit of which are forbidden, was given some days later in a further Order, dated July 30th, 1920.

The export prohibition contained in the German Neutrality Orders clearly could not apply to the passage through the Canal of the articles enumerated when such articles were despatched from one foreign country and consigned to another foreign country. Nor does the word "transit" appear to refer to the Kiel Canal; it no doubt only refers to the German territory to which the stipulations of Article 380 are not applicable. In any case a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace.

Since Article 380 of the Treaty of Versailles lays down that the Kiel Canal shall be maintained free and open to the vessels of commerce and war of all nations at peace with Germany, it is impossible to allege that the terms of this article preclude, in the interests of the protection of Germany's neutrality, the transport of contraband of war. The German Government had not at the time when the "Wimbledon" incident took place claimed any right to close the Canal to ships of war of belligerent nations at peace with Germany. On the contrary, in the note of the President of the German Delegation to the President of the Conference of Ambassadors of April 20th, 1921, it is expressly stated that the German Government claimed to apply its neutrality orders only to vessels of commerce and not to vessels of war. The Court is not called upon to give an opinion in regard to the legal effect of such statement; but if, as seems certain, it contains, in regard to the passage of belligerent war vessels through the Kiel Canal, an accurate interpretation of the Treaty of Versailles, it follows *a fortiori* that the passage of neutral vessels carrying contraband of war is authorised by Article 380, and cannot be imputed to Germany as a failure to fulfil its duties as a neutral. If, therefore, the "Wimbledon," making use of the permission granted it by Article 380, had passed through the Kiel Canal, Germany's neutrality would have remained intact and irreproachable.

From the foregoing, therefore, it appears clearly established that Ger-

many not only did not, in consequence of her neutrality, incur the obligation to prohibit the passage of the "Wimbledon" through the Kiel Canal, but, on the contrary, was entitled to permit it. Moreover under Article 380 of the Treaty of Versailles, it was her definite duty to allow it. She could not advance her neutrality orders against the obligations which she had accepted under this Article. Germany was perfectly free to declare and regulate her neutrality in the Russo-Polish war, but subject to the condition that she respected and maintained intact the contractual obligations which she entered into at Versailles on June 28th, 1919.

In these circumstances it will readily be seen that it would be useless to consider in this case whether the state of war between Russia and Poland, and with it Germany's neutrality, had or had not terminated at the date on which the "Wimbledon" incident occurred. In war time as in peace time the Kiel Canal should have been open to the "Wimbledon" just as to every vessel of every nation at peace with Germany. . . .

V

For these reasons

the Court,

having heard both parties, . . . passes judgment to the following effect:

1. that the German authorities on March 21st, 1921, were wrong in refusing access to the Kiel Canal to the S.S. "Wimbledon";

2. that Article 380 of the Treaty signed at Versailles on June 28th, 1919, between the Allied and Associated Powers and Germany, should have prevented Germany from applying to the Kiel Canal the Neutrality Order promulgated by her on July 25th, 1920;

3. that the German Government is bound to make good the prejudice sustained by the vessel and her charterers as the result of this action;

[Points 4-6 are omitted.]

(Signed) LODER

President

(Signed) Å. HAMMARSKJÖLD

Registrar

[MM. Anzilotti and Huber, Judges, and M. Schücking, German National Judge, delivered separate opinions.]

§ 58. SERVITUDES—JURISDICTION OVER INTERNATIONAL RIVERS

NOTE BY THE EDITOR

In the case of the *S.S. Wimbledon*, the Permanent Court of International Justice passed its judgment on the terms of Article 380 of the Treaty

of Versailles, stating that its terms "are categorical and give rise to no doubt." It did not feel called upon "to take a definite attitude with regard to the question, which is moreover of a very controversial nature, whether in the domain of international law, there really exist servitudes analogous to the servitudes of private law." This caution was not shared by National Judge Schücking, who argued in a separate opinion (not reprinted here) that the terms of Article 380 constituted a servitude in international law.

"On the basis of reason and authority," says Professor Helen Dwight Reid, "we may say that an international servitude is a real right; whereby the territory of one state is made liable to permanent use by another state, for some specified purpose. The servitude may be permissive or restrictive, but does not involve any obligation upon either party to take positive action. It establishes a permanent legal relationship of territory to territory, unaffected by change of sovereignty in either of them, and terminable only by mutual consent, by renunciation on the part of the dominant state, or by consolidation of the territories affected."¹

If the provisions of Article 380 had been held to constitute a servitude, it might have been contended that the geographical area in 1919 constituting Germany (the servient State) was bound to keep open the Kiel Canal under the terms of the treaty, to the vessels from the geographical areas then constituting Great Britain, France, Italy and Japan (dominant States; parties to the treaty) even after the termination of the Treaty of Versailles, or the disappearance of all the States concerned. While such a doctrine might prove of value in such matters as opening permanently international highways of commerce, and securing permanent egress to the sea to landlocked States irrespective of political vicissitudes, it is not difficult to see why States hesitate to encourage a doctrine which places such a burden on the servient State.

Professor Reid concluded, not only that many international conventions embodied what might properly be called servitudes, but that "wherever it is possible and desirable to establish a permanent international relationship, attaching to the territory concerned irrespective of changes in its nationality, the international servitude affords a direct and simple method of accomplishing that result, and seems destined to play a rôle of increasing importance in international law and in the practice of nations."²

While the better opinion holds that obligations like those the Treaty of Versailles imposed upon Germany in the case of the Kiel Canal are not servitudes, nevertheless, obligations of this general type have been successfully used to set up regimes of immense importance over many international rivers. In the absence of regimes established by convention, States controlling

¹ *International Servitudes in Law and Practice*, 25, by permission of the author and the University of Chicago Press.

² *Ibid.*, 210.

both banks of the lower reaches of a river flowing through several States could close the river to the commerce of States above them on the principle of territorial sovereignty; this principle received the imprimatur of the Germany-Venezuelan Arbitration Commission under the Agreement of 1903, when it upheld Venezuela's right to close ports upon the Catatumbo and Zulia rivers to the commerce of a German national, Faber, whose place of business was in Colombia. "It seems difficult upon principle to support the right to the free use of rivers as a right *stricti juris*. While this is not expressly admitted, it is tacitly conceded by nearly all the advocates."³ The requirements of commerce, navigation, and the use of the waters, however, resulted in the opening of many important rivers to the use of all States by international agreement culminating in the remarkable *Statute of Barcelona* in 1921. Internationalized rivers prior to this Statute included the Rhine, Neckar, Maine, Meuse, and Scheldt (from 1815); the Danube (from 1856); the Elbe (from 1821); the Niemen and the Oder (from 1920); the Congo and the Niger (from 1885); the Amazon (but only by Brazilian decree, 1867); all Peruvian rivers (Peruvian decree, 1867); Bolivian tributaries to the Amazon and the Platte (decree, 1853; treaty with United States, 1858); the Rio de la Plata (1853), and others.⁴

The *Statute on the Regime of Navigable Waterways of International Concern*, opened for signature at Barcelona in 1921 and in force October 31, 1932, provided, in part:

ARTICLE 1. In the application of the Statute, the following are declared to be navigable waterways of international concern: 1. All parts which are naturally navigable to and from the sea of a waterway which in its course, naturally navigable to and from the sea, separates or traverses different States, and also any part of any other waterway naturally navigable to and from the sea, which connects with the sea a waterway naturally navigable which separates or traverses different States. . . . 2. Waterways, or parts of waterways, whether natural or artificial, expressly declared to be placed under the regime of the General Convention regarding navigable waterways of international concern. . . .

ARTICLE 3. Subject to the provisions contained in Articles 15 and 17, each of the Contracting States shall accord free exercise of navigation to the vessels flying the flag of any one of the other Contracting States on those parts of navigable waterways specified above which may be situated under its sovereignty or authority.

ARTICLE 4. In the exercise of navigation referred to above, the nationals, property and flags of all Contracting States shall be treated in all respects on a footing of perfect equality. No distinction shall be made between the nationals,

³ J. H. Ralston's Report, *Venezuelan Arbitrations of 1903*, pp. 600, 630.

⁴ See Ogilvie, *International Waterways* (1920); H. D. Reid, *International Servitudes* (1932) Chap. XIV; van Eysinga, "Les fleuves et canaux internationaux," 2 *Bibliotheca Visseriana* (1924) 122-157.

the property and the flags of the different riparian States, including the riparian State exercising sovereignty or authority over the portion of the navigable waterway in question: similarly, no distinction shall be made between the nationals, the property, and the flags of riparian and non-riparian States. . . . No distinction shall be made in the said exercise, by reason of the point of departure, or of destination, or of the direction of traffic. . . . [Articles 5-24 are omitted.] ⁵

The Convention to which this Statute was annexed was in force (July 31, 1938) between the following States: Albania, United Kingdom, Bulgaria, Chile, Czechoslovakia, Denmark, Finland, France, Greece, Hungary, India, Italy, Luxemburg, New Zealand, Norway, Roumania, Siam, Sweden, and Turkey.⁶

§ 59. EXTRATERRITORIALITY

NOTE BY THE EDITOR

In certain instances, States enjoy a certain limited jurisdiction over acts committed within the territory of foreign States, by virtue of specific treaty stipulations between the States concerned. The origin of the practice is briefly explained as follows by the United States Supreme Court in 1891.

The practice of European governments to send officers to reside in foreign countries, authorized to exercise a limited jurisdiction over vessels and seamen of their country, to watch the interests of their countrymen, and to assist in adjusting their disputes and protecting their commerce, goes back to a very early period, even preceding what are termed the "Middle Ages." During those ages these commercial magistrates, generally designated as "consuls," possessed to some extent a representative character, sometimes discharging judicial and diplomatic functions. In other than Christian countries they were, by treaty stipulations, usually clothed with authority to hear complaints against their countrymen, and to sit in judgment upon them when charged with public offenses. After the rise of Islamism, and the spread of its followers over Western Asia and other countries bordering on the Mediterranean, the exercise of this judicial authority became a matter of great concern. The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected all their intercourse, and all proceedings had in their tribunals. Even the rules of evidence adopted by them placed those of different faith on unequal grounds in any controversy with them. For this cause, and by reason of the barbarous and cruel punishments inflicted in those countries, and the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments to withdraw the trial of their subjects, when charged with the commission of a public offense, from the arbitrary and despotic action of the local officials. Treaties

⁵ Text as reprinted in Hudson, *International Legislation* (1931), I, 645-646.

⁶ List from Ottlik, *Annuaire de la Société des Nations*, 1938, p. 320, *Annexe*.

conferring jurisdiction upon these consuls were essential to the peaceful residence of Christians within those countries, and the successful prosecution of commerce with their people.

The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein.¹

The celebrated Cushing Treaty of 1844 between the United States and China provided that "subjects of China who may be guilty of any criminal act towards citizens of the United States shall be arrested and punished by the Chinese authorities according to the laws of China; and citizens of the United States who may commit any crime in China shall be subject to be tried and punished only by the counsel, or other public functionary of the United States, thereto authorized, according to the laws of the United States" (Article XXI), while "all questions in regard to rights, whether of property or person, arising between citizens of the United States in China, shall be subject to the jurisdiction of, and regulated by the authorities of their own government. And all controversies occurring in China between citizens of the United States and the subjects of any other government shall be regulated by the treaties existing between the United States and such governments respectively, without interference on the part of China" (Article XXV). Since 1906 the jurisdiction of American consular officials under this treaty has been shared by the United States Court for China, established by statute of Congress,² which also hears appeals from consular decisions. From the United States Court for China appeals may be taken to the Circuit Court of Appeals at San Francisco.

Extraterritorial jurisdiction is still exercised by the United States (1939) in China, Egypt, and Morocco, and was exercised until 1894 in Japan and until 1920 in Siam. Extraterritorial privileges recently came to an end generally in Turkey and Persia. The prospects are that they will soon be terminated in China, Egypt (by 1949, under the 1937 Montreaux Convention), and Morocco.

The student should also consult *Dainese v. Hale* (1875) 91 U. S. 13; *In re Ross* (1891) 140 U. S. 453; *Biddle v. U. S.* (1907) 156 F. 759; the *Casablanca Arbitration*, Wilson, *Hague Arbitration Cases* (1915) 82; Lobin-gier, *Extraterritorial Cases*; P. M. Brown, "Extraterritoriality" and "Capitulations," in *Encyclopaedia of the Social Sciences*, and in 31 *A.J.I.L.* (1937), 293, 469 (Egypt); G. W. Keeton, *Development of Extraterritoriality in China* (1928).

¹ *In re Ross*, 140 U. S. 453, 462.

² 34 Stat. 814.

E. Certain Special Cases

§ 60. FOREIGN MERCHANTMEN IN PORTS

The case below illustrates both a type of jurisdiction exercised by the sovereign of the port over merchant vessels of foreign States, and a type of consular activity. (Compare §§ 50, 54, 87.)

Wildenhus' Case

SUPREME COURT OF THE UNITED STATES, 1887

120 U. S. 1¹

[Wildenhus, a Belgian subject and a member of the crew of the Belgian steamship *Noordland*, murdered Fijens, also a Belgian subject and member of the crew, while the ship was moored at a dock in Jersey City, New Jersey. Wildenhus was thereupon arrested by the Jersey City authorities. The Belgian consul sought a writ of *habeas corpus* on behalf of the prisoner, contending that under Belgian laws and decrees and under the treaty between the United States and Belgium concluded March 9, 1880, the offense with which Wildenhus was charged was "solely cognizable by the authority of the laws of the kingdom of Belgium," and that the State of New Jersey was without jurisdiction. Article 11 of the treaty provided as follows: "The respective consuls general, consuls, vice-consuls, and consular agents shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of all differences which may arise, either at sea or in port, between the captains, officers, and crews, without exception, particularly with reference to the adjustment of wages and the execution of contracts. The local authorities shall not interfere, except when the disorder that has arisen is of such a nature as to disturb tranquillity and public order on shore or in the port, or when a person of the country, or not belonging to the crew, shall be concerned therein. In all other cases, the aforesaid authorities shall confine themselves to lending aid to the consuls and vice-consuls or consular agents, if they are requested by them to do so, in causing the arrest and imprisonment of any person whose name is inscribed on the crew list, whenever, for any cause, the said officers shall think proper." 21 Stat. 123.]

The Circuit Court refused to deliver the prisoner to the Consul, and this appeal was taken to the Supreme Court of the United States.]

¹ Reported in 7 S. Ct. 385 as *Mali v. Keeper of the Common Jail*.

MR. CHIEF JUSTICE WAITE . . . delivered the opinion of the court . . .
. . . the question we have to consider is, whether these prisoners are held in violation of the provisions of the existing treaty between the United States and Belgium.

It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by Chief Justice Marshall in *The Exchange*, 7 Cranch, 116, 144, "it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such . . . merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country." *United States v. Dieckelman*, 92 U. S. 520; 1 Phillimore's Int. Law, 3d ed. 483, § 351; Twiss' Law of Nations in Time of Peace, 229, § 159; Creasy's Int. Law, 167, § 176; Halleck's Int. Law, 1st ed. 171. And the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. *Regina v. Cunningham*, Bell. C. C. 72; S. C. 8 Cox C. C. 104; *Regina v. Anderson*, 11 Cox C. C. 198, 204; S. C. L. R. 1 C. C. 161, 165; *Regina v. Keyn*, 13 Cox C. C. 403, 486, 525; S. C. 2 Ex. Div. 63, 161, 213. As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled.

From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority. Such being the general public law on this subject, treaties and conventions have been entered into

by nations having commercial intercourse, the purpose of which was to settle and define the rights and duties of the contracting parties with respect to each other in these particulars, and thus prevent the inconvenience that might arise from attempts to exercise conflicting jurisdictions . . .

[The Chief Justice then considers various types of treaties entered into by the United States for the purpose of regulating the jurisdiction of consuls within its borders.]

It thus appears that at first provision was made only for giving consuls police authority over the interior of the ship and jurisdiction in civil matters arising out of disputes or differences on board, that is to say, between those belonging to the vessel. Under this police authority the duties of the consuls were evidently confined to the maintenance of order and discipline on board. This gave them no power to punish for crimes against the peace of the country. In fact they were expressly prohibited from interfering with the local police in matters of that kind . . .

In the next conventions consuls were simply made judges and arbitrators to settle and adjust differences between those on board. This clearly related to such differences between those belonging to the vessel as are capable of adjustment and settlement by judicial decision or by arbitration, for it simply made the consuls judges or arbitrators in such matters. That would of itself exclude all idea of punishment for crimes against the state which affected the peace and tranquillity of the port; but, to prevent all doubt on this subject, it was expressly provided that it should not apply to differences of that character.

Next came a form of convention which in terms gave the consul authority to cause proper order to be maintained on board and to decide disputes between the officers and crew, but allowed the local authorities to interfere if the disorders taking place on board were of such a nature as to disturb the public tranquillity, and that is substantially all there is in the convention with Belgium which we have now to consider. . . . Each nation has granted to the other such local jurisdiction within its own dominion as may be necessary to maintain order on board a merchant vessel, but has reserved to itself the right to interfere if the disorder on board is of a nature to disturb the public tranquillity.

The treaty is part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere. If it gives the counsel of Belgium exclusive jurisdiction over the offence which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty by writ of *habeas corpus* in any proper court of the United States. This being the case, the only important question left for our determination is whether the thing which has been done—the disorder that has arisen—on board this vessel is

of a nature to disturb the public peace, or, as some writers term it, the "public repose" of the people who look to the State of New Jersey for their protection. If the thing done—"the disorder," as it is called in the treaty—is of a character to affect those on shore or in the port when it becomes known, the fact that only those on the ship saw it when it was done is a matter of no moment. Those who are not on the vessel pay no special attention to the mere disputes or quarrels of the seamen while on board, whether they occur under deck or above. Neither do they as a rule care for anything done on board which relates only to the discipline of the ship, or to the preservation of order and authority. Not so, however, with crimes which from their gravity awaken a public interest as soon as they become known, and especially those of a character which every civilized nation considers itself bound to provide a severe punishment for when committed within its own jurisdiction. In such cases inquiry is certain to be instituted at once to ascertain how or why the thing was done, and the popular excitement rises or falls as the news spreads and the facts become known. It is not alone the publicity of the act, or the noise and clamor which attends it, that fixes the nature of the crime, but the act itself. If that is of a character to awaken public interest when it becomes known, it is a "disorder" the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose people have been disturbed by what was done. The very nature of such an act is to disturb the quiet of a peaceful community, and to create, in the language of the treaty, a "disorder" which will "disturb tranquillity and public order on shore or in the port." The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction. It may not be easy at all times to determine to which of the two jurisdictions a particular act of disorder belongs. Much will undoubtedly depend on the attending circumstances of the particular case, but all must concede that felonious homicide is a subject for the local jurisdiction, and that if the proper authorities are proceeding with the case in a regular way, the consul has no right to interfere to prevent it. That, according to the petition for the *habeas corpus*, is this case.

This is fully in accord with the practices in France, where the government has been quite as liberal towards foreign nations in this particular as any other, and where, as we have seen in the cases of *The Sally* and *The Newton*, by a decree of the Council of State, representing the political department of the government, the French courts were prevented from exercising jurisdiction. But afterwards, in 1859, in the case of *Jally*, the mate of an American merchantman who had killed one of the crew and severely

wounded another on board the ship in the port of Havre, the Court of Cassation, the highest judicial tribunal of France, upon full consideration held, while the Convention of 1853 was in force, that the French courts had rightful jurisdiction, for reasons which sufficiently appear in the following extract from its judgment:

"Considering that it is a principle of the law of nations that every state has sovereign jurisdiction throughout its territory;

"Considering that by the terms of Article 3 of the Code Napoleon the laws of police and safety bind all those who inhabit French territory, and that consequently foreigners, even *transeuntes*, find themselves subject to those laws;

"Considering that merchant vessels entering the port of a nation other than that to which they belong cannot be withdrawn from the territorial jurisdiction, in any case in which the interest of the state of which that port forms part finds itself concerned, without danger to good order and to the dignity of the government;

"Considering that every state is interested in the repression of crimes and offences that may be committed in the ports of its territory, not only by the men of the ship's company of a foreign merchant vessel towards men not forming part of that company, but even by men of the ship's company among themselves, whenever the act is of a nature to compromise the tranquillity of the port, or the intervention of the local authority is invoked, or the act constitutes a crime of common law" (*droit commun*, the law common to all civilized nations), "the gravity of which does not permit any nation to leave it unpunished, without impugning its rights of jurisdictional and territorial sovereignty, because that crime is in itself the most manifest as well as the most flagrant violation of the laws which it is the duty of every nation to cause to be respected in all parts of its territory." 1 Ortolan, *Diplomatie de la Mer* (4th ed.), pp. 455, 456; Sirey (N. S.), 1859, p. 189.

*The judgment of the Circuit Court is affirmed.*²

§ 61. MERCHANTMEN IN FOREIGN WATERS

Regina v. Anderson

COURT OF CRIMINAL APPEAL OF ENGLAND, 1868

11 Cox, *Criminal Cases*, 198.

Case reserved by Byles, J., at the October Sessions of the Central Criminal Court, 1868, for the opinion of this Court.

² See § 87 below, for provisions of a consular convention, and the *Ester*, 190 Fed. (1911) 216, for a succinct summary of United States practice; A. H. Charteris, "The Legal Position of Merchantmen in Foreign Ports and Territorial Waters," *B.Y.I.L.* (1920), 45; P. C. Jessup, "Civil Jurisdiction over Ships in Innocent Passage," 27 *A.J.I.L.* (1933), 747.—Ed.

James Anderson, an American citizen, was indicted for murder on board a vessel, belonging to the port of Yarmouth in Nova Scotia. She was registered in London, and was sailing under the British flag.

At the time of the offence committed the vessel was in the river Garonne, within the boundaries of the French empire, on her way up to Bordeaux, which city is by the course of the river about ninety miles from the open sea. The vessel had proceeded about half-way up the river, and was at the time of the offence about three hundred yards from the nearest shore, the river at that place being about half a mile wide.

The tide flows up to the place and beyond it.

No evidence was given whether the place was or was not within the limits of the port of Bordeaux.

It was objected for the prisoner that the offence having been committed within the empire of France, the vessel being a colonial vessel, and the prisoner an American citizen, the Court had no jurisdiction to try him.

I expressed an opinion unfavourable to the objection, but agreed to grant a case for the opinion of this Court.

The prisoner was convicted of manslaughter.

J. BARNARD BYLES

BOVILL, C. J.: There is no doubt that the place where the offence was committed was within the territory of France, and that the prisoner was therefore subject to the laws of France, which the local authorities of that realm might have enforced if so minded; but at the same time, in point of law, the offence was also committed within British territory, for the prisoner was a seaman on board a merchant vessel, which, as to her crew and master, must be taken to have been at the time under the protection of the British flag, and, therefore, also amenable to the provisions of the British law. It is true that the prisoner was an American citizen, but he had with his own consent embarked on board a British vessel as one of the crew. Although the prisoner was subject to the American jurisprudence as an American citizen, and to the law of France as having committed an offence within the territory of France, yet he must also be considered as subject to the jurisdiction of British law, which extends to the protection of British vessels, though in ports belonging to another country. From the passage in the treatise of Ortolan, already quoted, it appears that, with regard to offences committed on board of foreign vessels within the French territory, the French nation will not assert their police law unless invoked by the master of the vessel, or unless the offence leads to a disturbance of the peace of the port; and several instances where that course was adopted are mentioned. Among these are two cases where offences were committed on board American vessels—one at the port of Antwerp, and the other at Marseilles—and where, on the local authorities interfering, the American Court claimed exclusive juris-

diction. As far as America herself is concerned, it is clear that she, by the statutes of the 23d of March, 1825, has made regulations for persons on board her vessels in foreign parts, and we have adopted the same course of legislation. Our vessels must be subject to the laws of the nation at any of whose ports they may be, and also to the laws of our country, to which they belong. As to our vessels when going to foreign parts we have the right, if we are not bound, to make regulations. America has set us a strong example that we have the right to do so. In the present case, if it were necessary to decide the question on the 17 & 18 Vict. c. 104, I should have no hesitation in saying that we now not only legislate for British subjects on board of British vessels, but also for all those who form the crews thereof, and that there is no difficulty in so construing the statute; but it is not necessary to decide that point now. Independently of that statute, the general law is sufficient to determine this case. Here the offence was committed on board a British vessel by one of the crew, and it makes no difference whether the vessel was within a foreign port or not. If the offence had been committed on the high seas it is clear that it would have been within the jurisdiction of the Admiralty, and the Central Criminal Court has now the same extent of jurisdiction. Does it make any difference because the vessel was in the river Garonne half-way between the sea and the head of the river? The place where the offence was committed was in a navigable part of the river below bridge, and where the tide ebbs and flows, and great ships do lie and hover. An offence committed at such a place, according to the authorities, is within the Admiralty jurisdiction, and it is the same as if the offence had been committed on the high seas. On the whole I come to the conclusion that the prisoner was amenable to the British law, and that the conviction was right.

BYLES, J.: I am of the same opinion. I adhere to the opinion that I expressed at the trial. A British ship is, for the purposes of this question, like a floating island; and, when a crime is committed on board a British ship, it is within the jurisdiction of the Admiralty Court, and therefore of the Central Criminal Court, and the offender is as amenable to British law as if he had stood on the Isle of Wight and committed the crime. Two English and two American cases decide that a crime committed on board a British vessel in a river like the one in question, where there is the flux and reflux of the tide, wherein great ships do hover, is within the jurisdiction of the Admiralty Court; and that is also the opinion expressed in Kent's Commentaries. The only effect of the ship being within the ambit of French territory is that there might have been concurrent jurisdiction had the French claimed it. I give no opinion on the question whether the case comes within the enactment of the Merchant Shipping Act.

BLACKBURN, J.: I am of the same opinion. It is not necessary to decide whether the case comes within the Merchant Shipping Act. If the offence

could have been properly tried in any English court, then the Central Criminal Court had jurisdiction to try it. It has been decided by a number of cases that a ship on the high seas, carrying a national flag, is part of the territory of that nation whose flag she carries; and all persons on board her are to be considered as subject to the jurisdiction of the laws of that nation, as much so as if they had been on land within that territory. From the earliest times it has been held that the maritime courts have jurisdiction over offences committed on the high seas where great ships go, which are, as it were, common ground to all nations, and that the jurisdiction extends over ships in rivers or places where great ships go as far as the tide extends. In this case the vessel was within French territory, and subject to the local jurisdiction, if the French authorities had chosen to exercise it. Our decisions establish that the Admiralty jurisdiction extends at common law over British ships on the high seas, or in waters where great ships go as far as the tide ebbs and flows. The cases *Rex v. Allen* [1 Moo. C. C. 494] and *Rex v. Jemot* [Old Bailey, 1812, MS.] are most closely in point, and establish that offences committed on board British ships in places where great ships go are within the jurisdiction of the Court of Admiralty, and consequently of the Central Criminal Court. In America it appears, from the case of *The United States v. Wiltberger* [5 Wheaton, 76], that it was held that the United States had no jurisdiction in the case of the crime of manslaughter committed on board a United States vessel in the river Tigris in China; but, as I understand the American cases of *Thomas v. Lane* [2 Sumner, 1] and *The United States v. Coombes* [12 Peters, 71], a rule more in conformity with the English decisions was laid down; and upon those authorities I take it that the American courts would agree with us. It is clear, therefore, that a person on board a British ship is amenable to the British law just as much as a British person on board an American ship is subject to the American law. My view is, that when a person is on board a vessel sailing under the British flag, and commits a crime, that nation has a right to punish him for the crime committed by him; and clearly the same doctrine extends to those who are members of the crew of the vessel. . . .

*Conviction affirmed.*¹

[Baron Channel and Justice Lush delivered concurring opinions.]

¹In *United States v. Flores* (1933) 289 U. S. 137, 53 S. Ct. 580, the United States Supreme Court held that a murder committed by an American citizen on board an American vessel while the vessel was anchored in a port 250 miles inland in the Belgian Congo was within the admiralty and maritime jurisdiction of the United States. The Court was careful to say that this was "in the absence of any controlling treaty provision, and any assertion of jurisdiction by the territorial sovereign."—Ed.

§ 62. PIRATES

Ordinarily the ships of one State may not seize those of another on the high seas in time of peace, but the necessities of commerce and the preservation of international law and order in peacetime have led to the establishment of the right of the ships of any nation to seize pirates. The discussion by the Judicial Committee of the Privy Council printed below clarifies the nature of this right.

In Re Piracy Jure Gentium

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, GREAT BRITAIN, 1934
VISCOUNT SANKEY, L. C., LORD ATKIN, LORD TOMLIN, LORD MACMILLAN,
AND LORD WRIGHT

Text from 29 *American Journal of International Law* (1935), 140-150.

By an Order in Council, dated November 10, 1933, the following question was referred to their Lordships for their hearing and consideration. "Whether actual robbery is an essential element of the crime of piracy *jure gentium* or whether a frustrated attempt to commit a piratical robbery is not equally piracy *jure gentium*." The circumstances giving rise to the reference are set out in the judgment of the Board delivered by the Lord Chancellor. . . .

The Lord Chancellor, in giving the judgment of the Board, said:—On January 4, 1931, on the high seas, a number of armed Chinese nationals were cruising in two Chinese junks. They pursued and attacked a cargo junk which was also a Chinese vessel. The master of the cargo junk attempted to escape, and a chase ensued during which the pursuers came within 200 yards of the cargo junk. The chase continued for over half an hour, during which shots were fired by the attacking party, and while it was still proceeding the S.S. *Hang Sang* approached and subsequently also the S.S. *Shui Chow*. The officers in command of these merchant vessels intervened and, through their agency, the pursuers were eventually taken in charge by the commander of H.M.S. *Somme*, which had arrived in consequence of a report made by wireless. They were brought as prisoners to Hong-kong and indicted for the crime of piracy. The jury found them guilty subject to the following question of law: "Whether an accused person may be convicted of piracy in circumstances where no robbery has occurred." The full Court of Hong-kong on further consideration came to the conclusion that robbery was necessary to support a conviction of piracy, and in the result the accused were acquitted.

The decision of the Hong-kong Court was final, and the present proceedings are in no sense an appeal from that court, whose judgment stands.

On November 10, 1933, His Majesty in Council made the following

order: "The question whether actual robbery is an essential element of the crime of piracy *jure gentium* or whether a frustrated attempt to commit a piratical robbery is not equally piracy *jure gentium* is referred to the Judicial Committee for their hearing and consideration."

It is to this question that their Lordships have applied themselves, and they think it will be convenient to give their answer at once and then to make some further observations on the matter. The answer is as follows:

"Actual robbery is not an essential element in the crime of piracy *jure gentium*. A frustrated attempt to commit a piratical robbery is equally piracy *jure gentium*."

In considering such a question the Board is permitted to consult and act on a wider range of authority than that which it examines when the question for determination is one of municipal law only. The sources from which international law is derived include treaties between various States, State papers, municipal Acts of Parliament, and the decisions of municipal courts, and last, but not least, opinions of jurisconsults or text-book writers. It is a process of inductive reasoning. It must be remembered that in the strict sense international law still has no legislature, no executive, and no judiciary, though in a certain sense there is now an international judiciary in The Hague Tribunal, and attempts are being made by the League of Nations to draw up codes of international law. Speaking generally, in embarking upon international law their Lordships are to a great extent in the realm of opinion, and in estimating the value of opinion it is permissible not only to seek a consensus of views but to select what appear to be the better views upon the question.

With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes and the trials and punishment of the criminals are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its *terra firma* or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognized as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but *hostis humani generis*, and as such he is justiciable by any State anywhere. Grotius (1583-1645) *De Jure Belli ac Pacis*, Vol. II, cap. 20, section 40.

Their Lordships have been referred to a very large number of Acts of Parliament, decided cases, and opinions of jurisconsults or text-book writers, some of which lend colour to the contention that robbery is a necessary ingredient of piracy, others to the opposite contention. Their Lordships do not propose to comment on all of them, but it will be convenient to begin

the present discussion by referring to the Act of Henry VIII, cap. 15, in the year 1536, which was entitled "An Act for the punishment of pirates and robbers of the sea." Before that Act the jurisdiction over pirates was exercised by the High Court of Admiralty in England and that court administered the civil law. The civilians, however, had found themselves handicapped by some of their canons of procedure, as, for example that a man could not be found guilty unless he either confessed or was proved guilty by two witnesses. The Act recites the deficiency of the Admiralty jurisdiction in the trial of offences according to the civil law, and after referring to "all treasons, felonies, robberies, murders and confederacies hereafter to be committed in or upon the sea, &c." (it is not necessary to set out the whole of it), proceeds to enact that all offences committed at sea, &c., shall be tried according to the common law under the King's commission, to be directed to the Admiralty and others within the realm.

Many of the doubts and difficulties inherent in considering subsequent definitions of piracy are probably due to a misapprehension of that Act. . . .

The conception of piracy according to the civil law is expounded by Molloy (1646-90) *De Jure Maritimo et Navali* or *A Treatise of Affairs Maritime and of Commerce*.

That book was first published in 1676 and the ninth edition in 1769. Chapter IV is headed "Of Piracy." The author defines a pirate as "a Sea-Thief or *Hostis humani generis*, who to enrich himself either by surprise or open force sets upon merchants and others traders by sea." He clearly does not regard piracy as necessarily involving successful robbery or as being inconsistent with an unsuccessful attempt. Thus in para. xiii he says: "So likewise if a Ship shall be assaulted by Pirates, and in the Attempt the Pirates shall be overcome, if the Captors bring them to the next port and the Judge openly rejects the Trial, or the Captors cannot wait for the Judge without certain peril and loss, Justice may be done upon them by the Law of Nature, and the same may be there executed by the Captors." Again in para. xiv he puts the case: "If a pirate at Sea assault a Ship, but by force is prevented entering her," and goes on to distinguish the rule as to accessories at the common law and by the law marine. A somewhat similar definition of a pirate is given by the almost contemporary Italian jurist Casaregi, who wrote in 1670, and says: "Proprie pirata ille dicetur qui sine patentibus alicujus principis expropria tantum et privata auctoritate per mare discurrit depredante causa." But in certain trials for piracy held in England under the Act of Henry VIII a narrower definition of piracy seems to have been adopted.

Thus in 1696 the trial of Joseph Dawson and Others took place. It is reported in State Trials, Vol. XIII, col. 451. The prisoners were indicted for

"feloniously and piratically taking and carrying away, from persons unknown, a certain ship called the Gunsway . . . upon the high seas, ten leagues from the Cape St. Johns, near Surat in the East Indies." The court was comprised of Sir Charles Hedges, then Judge in the High Court of Admiralty, Lord Chief Justice Holt, Lord Chief Justice Treby, Lord Chief Baron Ward, and a number of other judges. Sir Charles Hedges gave the charge to the grand jury. In it he said: "Now piracy is only a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty. If any man be assaulted within that jurisdiction and his ship or goods violently taken away without legal authority, this is robbery and piracy." Dawson's case (*supra*) was described as the sheet anchor for those who contend that robbery is an ingredient of piracy. It must be remembered, however, that every case must be read *secundum subjectam materiam* and must be held to refer to the facts under dispute.

In Dawson's case (*supra*) the prisoners had undoubtedly committed robbery in their piratical expeditions. The only function of the Chief Judge was to charge the grand jury and in fact to say to them: "Gentlemen, if you find the prisoners have done these things, then you ought to return a true bill against them." The same criticism applies to certain charges given to grand juries by Sir Leoline Jenkins (1623-85). Judge of the Admiralty Court (1685). See the *Life of Leoline Jenkins*, Vol. IV, p. xciv. It cannot be suggested that these learned judges were purporting to give an exhaustive definition of piracy, and a moment's reflection will show that a definition of piracy as sea robbery is both too narrow and too wide. Take one example only. Assume a modern liner with its crew and passengers, say, of several thousand aboard, under its national flag, and suppose one passenger robbed another. It would be impossible to contend that such a robbery on the high seas was piracy and that the passenger in question had committed an act of piracy when he robbed his fellow-passenger, and was therefore liable to the penalty of death.

That is too wide a definition which would embrace all acts of plunder and violence in degree sufficient to constitute piracy simply because done on the high seas. As every crime may be committed at sea, piracy might thus be extended to the whole criminal code. If an act of robbery or murder were committed upon one of the passengers or crew by another in a vessel at sea, the vessel being at the time and continuing under lawful authority, and the offender were secured and confined by the master of the vessel, to be taken home for trial—this state of things would not authorize seizure and trial by any nation that chose to interfere, or within whose limits the offender might afterwards be found (Dana's Wheaton, 193, note 83, quoted in Moore's *Digest of International Law* [Washington, 1906], article "Piracy," p. 953).

But over and above that, we are not now in the year 1696; we are now in the year 1934. International law was not crystallized in the seventeenth century, but is a living and expanding code.

In his treatise on international law the English text-book writer Hall (1835-94) says, at page xxv of his preface to the third edition (1899):

Looking back over the last couple of centuries, we see international law at the close of each fifty years in a more solid position than that which it occupied at the beginning of the period. Progressively it has taken a firmer hold, it has extended its sphere of operation, it has ceased to trouble itself about trivial formalities, it has more and more dared to grapple in detail with the fundamental facts in the relations of States. The area within which it reigns beyond dispute has in that time been infinitely enlarged and it has been gradually enlarged within the memory of living men.

Again, another example may be given. A body of international law is growing up with regard to aerial warfare and aerial transport of which Sir Charles Hedges in 1696 could have had no possible idea.

A definition of piracy which appears to limit the term to robbery on the high seas was put forward by that eminent authority Hale (1609-76) in his *Pleas of the Crown*, edition 1736, Part I, cap. 27, p. 355, where he states: "It is out of the question, that piracy upon the statute is robbery." It is not surprising that subsequent definitions proceed on these lines.

Hawkins (1673-1746), *Pleas of the Crown* (1716), seventh edition, 1795, Vol. I, defines a pirate rather differently, at page 267: "A pirate is one who to enrich himself, either by surprise or open force, sets upon merchants or others trading by sea to spoil them of their goods or treasure." This does not necessarily import robbing.

Blackstone (1723-80), twentieth edition, Book IV, p. 76, states: "The offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas which, if committed upon the land, would have amounted to felony there."

East's *Pleas of the Crown* (1803), Vol. II, p. 796, defines the offence of piracy by common law as the commission "of those acts of robbery and depredation upon the high seas which, if committed on land, would have amounted to felony there." This definition would exclude an attempt at piracy, because an attempt to commit a crime is, with certain exceptions, not a felony but a misdemeanour.

Their Lordships were also referred to Scottish text-book writers, including Hume (1757-1838), *Scottish Criminal Law* (1797), and Alison (1792-1867), *Scottish Criminal Law* (1832), where similar definitions are to be found. It is sufficient to say with regard to these English and Scottish writers that, as was to be expected, they followed in some cases almost verbatim

the early concept, and the criticism upon them is: (1) that it is obvious that their definitions were not exhaustive; (2) that it is equally obvious that there appears to be from time to time a widening of the definition so as to include facts previously not foreseen; and (3) that they may have overlooked the explanation of the statute of Henry VIII as given by Coke and quoted above, and have thought of piracy as felony according to common law, whereas it was felony by civil law.

In *Archbold's Criminal Pleading*, twenty-eighth edition, 1931, will be found a full conspectus of the various statutes on piracy which have been from time to time passed in this country defining the offence in various ways and creating new forms of offence as coming within the general term piracy. These, however, are immaterial for the purpose of the case because it must always be remembered that the matter under present discussion is not what is piracy under any municipal Act of any particular country, but what is piracy *jure gentium*. When it is sought to be contended, as it was in this case, that armed men sailing the seas on board a vessel without any commission from any State could attack and kill everybody on board another vessel sailing under a national flag, without committing the crime of piracy unless they stole, say, an article worth sixpence, their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law. This appears to be recognized in the *Digest of Criminal Law* by the distinguished writer Sir James Fitzjames Stephen (1829-94), seventh edition, 1926, at p. 102. At the end of the article on piracy it is stated that: "It is doubtful whether persons cruising in armed vessels with intent to commit piracy are pirates or not"; but in a significant footnote it is added that: "The doubt expressed at the end of the article is founded on the absence of any express authority for the affirmation of the proposition, and on the absurdity of the negative."

Murray's Oxford Dictionary (1909) defines a pirate as "one who robs and plunders on the sea, navigable rivers, &c., or cruises about for that purpose."

It may now be convenient to turn to American authorities, and first of all Kent (1826). In his Comm. I, 183, he calls piracy "a robbery or a forcible depredation on the high seas, without lawful authority, and done *animo furandi*" in the spirit and intention of universal hostility.

Wheaton, writing in 1836, *Elements*, Pt. II, cap. 2, para. 16, defines piracy as being the offence of "depredating on the seas, without being authorized by any foreign State or with commissions from different sovereigns at war with each other." This enshrines a concept which had prevailed from earliest times that one of the main ingredients of piracy is an act performed by a person sailing the high seas without the authority or commission of any State. This has been frequently applied in cases where

insurgents had taken possession of a vessel belonging to their own country and the question arose what authority they had behind them. See the American case of the *Ambrose Light* (25 Fed. Rep. 408). Another instance is the case of the *Huascar* (Parl. Papers, Peru, No. 1 (1877)). In 1877 a revolutionary outbreak occurred at Callao, in Peru, and the ironclad *Huascar*, which had been seized by the insurgents, put to sea, stopped British steamers, took a supply of coal from one of them without payment, and forcibly took two Peruvian officials from on board another where they were passengers. The British Admiralty justly considered the *Huascar* was a pirate and attacked her.

In Moore's *Digest of International Law* (1906) (*ubi supra*), Vol. II, p. 953, a pirate is defined as "one who, without legal authority from any State, attacks a ship with intention to appropriate what belongs to it. The pirate is a sea-brigand. He has no right to any flag and is justiciable by all."

Time fails to deal with all the references to the works of foreign jurists to which their Lordships' attention was directed. It will be sufficient to select a few examples.

Ortolan (1802-73), a French jurist, and professor at the University of Paris, says, *Dip. de la Mer*, Book II, ch. xi: "Les pirates sont ceux, qui courent les mers de leur propre autorité, pour y commettre des actes de déprédation pillant à main armée les navires de toutes les nations."

Bluntschli (1808-81) a Swiss jurist and a professor at Munich and Heidelberg, published in 1870 *Le Droit International Codifié*, which, in Art. 343, lays down: "Sont considérés comme pirates les navires qui sans l'autorisation d'une puissance belligérante cherchent à s'emparer des personnes, à faire du butin (navires et marchandises), ou à anéantir dans un but criminel les biens d'autrui."

Calvo (1824-1906), an Argentine jurist and Argentine Minister at Berlin, para. 1,134, defines piracy: "Tout vol ou pillage d'un navire ami, toute déprédation, toute acte de violence commis à main armée en pleine mer contre la personne ou les biens d'un étranger soit en temps de paix soit en temps de guerre."

An American case strongly relied on by those who contend that robbery is an essential ingredient of piracy is that of the *United States v. Smith* (5 Wheaton, 153). Mr. Justice Story delivered the opinion of the court and there states (page 161): "Whatever may be the diversity of definitions in other respects, all writers concur in holding that robbery, or forcible depredation upon the sea, *animo furandi*, is piracy." He would be a bold lawyer to dispute the authority of so great a jurist, but the criticism upon that statement is that the learned judge was considering a case where the prisoners charged had possessed themselves of the vessel, the *Irresistible*, and had plundered and robbed a Spanish vessel. There was no doubt about the

robbery, and though the definition is unimpeachable as far as it goes it was applied to the facts under consideration and cannot be held to be an exhaustive definition including all acts of piracy. The case, however, is exceptionally valuable because from pages 163 to 180 of the report it tabulates the opinions of most of the writers on international law up to that time. But with all deference to so great an authority the remark must be applied to Mr. Justice Story in 1820 that has already been applied to Sir Charles Hedges in 1696, which is that international law has not become a crystallized code at any time, but is a living and expanding branch of the law.

In a later American decision, *United States v. The Malek Adhel* (2 How., 210), it was said, at page 232:

If he wilfully sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief, it is just as much piratical aggression, in the sense of the law of nations and of the Act of Congress, as if he did it solely and exclusively for the sake of plunder, *lucri causa*. The law looks to it as an act of hostility, and being committed by a vessel not commissioned and engaged in lawful warfare, it treats it as the act of a pirate, and of one who is emphatically *hostis humani generis*.

Having thus referred to the two cases, Dawson, 1696 (*supra*), and Smith, 1820 (*supra*), which are typical of one side of the question, their Lordships will briefly refer to two others from which the opposite conclusion is to be gathered.

It will be observed that both of them are more recent. The first is the decision in the case of *The Serhassan* (2 Robinson's Adm. Cas. 354), decided in the English High Court of Admiralty by that distinguished Judge Dr. Lushington (1782-1873) in 1845. It was on an application by certain officers for bounty which, under the statute 6 Geo. IV, cap. 49, was given to persons who captured pirates, and the learned judge said (it is not necessary to detail all the facts of the case for the purpose of the present opinion): "The question which I have to determine is whether or not the attack which was made upon the British pinnace and the two other boats constituted an act of piracy on the part of the prahns, so as to bring the persons who were on board within the legal denomination of pirates." He held it was an act of piracy and awarded the statutory bounty. It is true that that was a decision under the special statute under which the bounties were claimed, but it will be noted that there was no robbery in that case. What happened was that the pirates attacked, but were themselves beaten off and captured. A similar comment may be made on the case in 1853 of *The Magellan Pirates* (1 Spink Eccl. and Adm. Reports, 81), where Dr. Lushington said: "It was never, so far as I am able to find, deemed necessary to inquire whether parties so

convicted of these crimes [i.e., robbery and murder], had intended to rob on the high seas or to murder on the high seas indiscriminately."

Finally, there is the American case of *Ambrose Light* (*supra*), where it was decided by a Federal court that an armed ship must have the authority of a State behind it, and if it has not got such an authority it is a pirate even though no act of robbery has been committed by it.

It is true that the vessel in question was subsequently released on the ground that the Secretary of State had by implication recognized a state of war, but the value of the case lies in the decision of the court.

Their Lordships have dealt with two decisions by Dr. Lushington. It may here be not inappropriate to refer to another great English Admiralty judge and jurisconsult, Sir Robert Phillimore (1810-85). In his *International Law*, third edition, Vol. I (1879), he states, at page 488: "Piracy is an assault upon vessels navigated on the high seas, committed *animo furandi*, whether the robbery or forcible depredation be effected or not, and whether or not it be accompanied by murder or personal injury."

Lastly, Hall, to whose work on international law reference has already been made, states on page 314 of the eighth edition, 1924:

The various acts which are recognized or alleged to be piratical may be classed as follows:

Robbery or attempt at robbery of a vessel by force or intimidation, either by way of attack from without, or by way of revolt of the crew and conversion of the vessel and cargo to their own use.

Possibly the definition of piracy which comes nearest to accuracy coupled with brevity is that given by Kenny (1847-1930), *Outlines of Criminal Law*, at page 320, where he says that piracy is "any armed violence at sea which is not a lawful act of war," although even this would include a shooting affray between two passengers on a liner, which could not be held to be piracy.

It would, however, correctly include those acts which, so far as their Lordships know, have always been held to be piracy—that is, where the crew or passengers of a vessel on the high seas rise against the captain and officers and seek by armed force to seize the ship. Hall (*ubi supra*) put such a case in the passage just cited; it is clear from his words that it is not less a case of piracy because the attempt fails.

Before leaving the authorities it is useful to refer to a most valuable treatise on the subject of piracy contained in *The Research into International Law by the Harvard Law School*, published at Cambridge, Mass., in 1932. In it nearly all the cases, nearly all the statutes, and nearly all the opinions are set out on pages 749 to 1,013.

In 1926 the subject of piracy engaged the attention of the League of

Nations, who scheduled it as one of a number of subjects the regulation of which by international agreement seemed to be desirable and realizable at the present moment. Consequently, they appointed a subcommittee of their Committee of Experts for the Progressive Codification of International Law and requested the subcommittee to prepare a report on the question.

An account of the proceedings is contained in the League of Nations document C 196, M 70, 1927 V. The subcommittee was presided over by the Japanese jurist Mr. Matsuda, the Japanese Ambassador in Rome, and in their report at page 116 they state: "According to international law, piracy consists in sailing the seas for private ends without authorization from the Government of any State with the object of committing depredations upon property or acts of violence against persons."

The report was submitted to a number of nations and an analysis of their replies will be found at page 273 of the League of Nations document. A number of States recognized the possibility and desirability of an international convention on the question. The replies of Spain (page 154), of Greece (page 168), and especially of Rumania (page 208) deal at some length with the definition of piracy. Rumania adds, page 208:

Mr. Matsuda, however, maintains in his report that it is not necessary to premise explicitly the existence of a desire for gain, because the desire for gain is contained in the larger qualification "for private ends." In our view, the act of attacking for private ends does not necessarily mean that the attack is inspired by a desire for gain.

It is quite possible to attack without authorization from any State and for private ends, not with a desire for gain but for vengeance or for anarchistic or other ends.

The above definition does not in terms deal with an armed rising of the crew or passengers with the object of seizing the ship on the high seas.

However that may be, their Lordships do not themselves propose to hazard a definition of piracy.

They remember the words of M. Portalis, one of Napoleon's commissioners, who said:

We have guarded against the dangerous ambition of wishing to regulate and to foresee everything. . . . A new question springs up: then how is it to be decided? To this question it is replied that the office of the law is to fix by enlarged rules the general maxims of right and wrong, to establish firm principles fruitful in consequences, and not to descend to the detail of all questions which may arise upon each particular topic. (Quoted by Lord Halsbury, L. C., in Halsbury's *Laws of England*, Introduction, p. ccxi.)

A careful examination of the subject shows a gradual widening of the earlier definition of piracy to bring it from time to time more in consonance

with situations either not thought of or not in existence when the older jurisconsults were expressing their opinions.

All that their Lordships propose to do is to answer the question put to them, and, having examined all the various cases, all the various statutes, and the opinions of the various jurisconsults cited to them, they have come to the conclusion that the better view and the proper answer to give to the question addressed to them is that stated at the beginning—namely, that actual robbery is not an essential element in the crime of piracy *jure gentium*, and that a frustrated attempt to commit piratical robbery is equally piracy *jure gentium*.¹

§ 63. JURISDICTION IN THE AIR SPACE

The Convention for the Regulation of Aerial Navigation, while leaving many questions for future conventional treatment, is nevertheless an outstanding example of codification of international law. The field is a rapidly developing one; the growth may be observed in *The Journal of Air Law* (1930—); *Revue Générale de Droit Aérien* (1932—); and the *Official Bulletin* of the International Commission of Air Navigation.

Convention Relating to the Regulation of Aerial Navigation

OPENED FOR SIGNATURE AT PARIS, OCTOBER 13, 1919^{1a}

League of Nations Treaty Series, No. 297.

[Names of signatories omitted.]

CHAPTER I

General Principles

ARTICLE I. The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory.

For the purpose of the present Convention the territory of a State shall

¹ On piracy see the Harvard Law School Research in International Law, "Draft Convention on Piracy," and "Collection of Piracy Laws of Various Countries," in 26 *A.J.I.L.* (*Spec. Supp.*, 1932), 739, 887, and authorities there cited.—Ed.

^{1a} In force as between ratifying or adhering States July 11, 1922. The following States had ratified or adhered to this Convention in August 1939: Argentine, Australia, Belgium, Bulgaria, Canada, Chile, Czechoslovakia, Denmark, Finland, France, Greece, India, Iraq, Irish Free State, Italy, Japan, Latvia, Lichtenstein, Netherlands (including Curacao, Surinam, and Dutch East Indies), New Zealand, Nicaragua, Norway, Peru, Poland, Portugal, Roumania, Saar Territory, Siam, Spain, Sweden, Switzerland, Union of South Africa, United Kingdom, Uruguay, Yugoslavia. The United States of America signed the Convention May 31, 1920, but has not ratified. Persia adhered to the Convention, but its denunciation became effective April 20, 1934.

The text printed is that of the original Convention, which, however, has been amended at various points in conformity with the procedure under its Article 34. A Protocol of Amendments of June 1, 1935, is now being ratified (1939).—Ed.

be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto.

ART. 2. Each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States, provided that the conditions laid down in the present Convention are observed.

Regulations made by a contracting State as to the admission over its territory of the aircraft of the other contracting States shall be applied without distinction of nationality.

ART. 3. Each contracting State is entitled for military reasons or in the interest of public safety to prohibit the aircraft of the other contracting States, under the penalties provided by its legislation and subject to no distinction being made in this respect between its private aircraft and those of the other contracting States, from flying over certain areas of its territory.

In that case the locality and the extent of the prohibited areas shall be published and notified beforehand to the other contracting States.

ART. 4. Every aircraft which finds itself above a prohibited area shall, as soon as aware of the fact, give the signal of distress provided in Paragraph 17 of Annex D and land as soon as possible outside the prohibited area at one of the nearest aerodromes of the State unlawfully flown over.

CHAPTER II

Nationality of Aircraft

ART. 5. No contracting State shall, except by a special and temporary authorisation, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State.

ART. 6. Aircraft possess the nationality of the State on the register of which they are entered, in accordance with the provisions of Section I (c) of Annex A.

ART. 7. No aircraft shall be entered on the register of one of the contracting States unless it belongs wholly to nationals of such State.

No incorporated company can be registered as the owner of an aircraft unless it possess the nationality of the State in which the aircraft is registered, unless the President or chairman of the company and at least two-thirds of the directors possess such nationality, and unless the company fulfills all other conditions which may be prescribed by the laws of the said State.

ART. 8. An aircraft cannot be validly registered in more than one State.

ART. 9. The contracting States shall exchange every month among themselves and transmit to the International Commission for Air Navigation referred to in article 34 copies of registrations and of cancellations of

registrations which shall have been entered on their official registers during the preceding month.

ART. 10. All aircraft engaged in international navigation shall bear their nationality and registration marks as well as the name and residence of the owner in accordance with Annex A.

CHAPTER III

Certificates of Airworthiness and Competency

ART. 11. Every aircraft engaged in international navigation shall, in accordance with the conditions laid down in Annex B, be provided with a certificate of airworthiness issued or rendered valid by the State whose nationality it possesses.

ART. 12. The commanding officer, pilots, engineers and other members of the operating crew of every aircraft shall, in accordance with the conditions laid down in Annex E, be provided with certificates of competency and licences issued or rendered valid by the State whose nationality the aircraft possesses.

ART. 13. Certificates of airworthiness and of competency and licences issued or rendered valid by the State whose nationality the aircraft possesses, in accordance with the regulations established by Annex B and Annex E and hereafter by the International Commission for Air Navigation, shall be recognised as valid by the other States.

Each State has the right to refuse to recognise for the purpose of flights within the limits of and above its own territory certificates of competency and licences granted to one of its nationals by another contracting State.

ART. 14. No wireless apparatus shall be carried without a special licence issued by the State whose nationality the aircraft possesses. Such apparatus shall not be used except by members of the crew provided with a special licence for the purpose.

Every aircraft used in public transport and capable of carrying ten or more persons shall be equipped with sending and receiving wireless apparatus when the methods of employing such apparatus shall have been determined by the International Commission for Air Navigation.

This Commission may later extend the obligation of carrying wireless apparatus to all other classes of aircraft in the conditions and according to the methods which it may determine.

CHAPTER IV

Admission to Air Navigation Above Foreign Territory

ART. 15. Every aircraft of a contracting State has the right to cross the air space of another State without landing. In this case it shall follow the

route fixed by the State over which the flight takes place. However, for reasons of general security it will be obliged to land if ordered to do so by means of the signals provided in Annex D.

Every aircraft which passes from one State into another shall, if the regulations of the latter State require it, land in one of the aerodromes fixed by the latter. Notification of these aerodromes shall be given by the contracting States to the International Commission for Air Navigation and by it transmitted to all the contracting States.

The establishment of international airways shall be subject to the consent of the States flown over.

ART. 16. Each contracting State shall have the right to establish reservations and restrictions in favour of its national aircraft in connection with the carriage of persons and goods for hire between two points on its territory.

Such reservations and restrictions shall be immediately published, and shall be communicated to the International Commission for Air Navigation, which shall notify them to the other contracting States.

ART. 17. The aircraft of a contracting State which establishes reservations and restrictions in accordance with Article 16, may be subjected to the same reservations and restrictions in any other contracting State, even though the latter State does not itself impose the reservations and restrictions on other foreign aircraft.

ART. 18. Every aircraft passing through the territory of a contracting State, including landing and stoppages reasonably necessary for the purpose of such transit, shall be exempt from any seizure on the ground of infringement of patent, design or model, subject to the deposit of security the amount of which in default of amicable agreement shall be fixed with the least possible delay by the competent authority of the place of seizure.

CHAPTER V

Rules to Be Observed on Departure, When Under Way, and on Landing

ART. 19. Every aircraft engaged in international navigation shall be provided with:

- (a) A certificate of registration in accordance with Annex A;
- (b) A certificate of airworthiness in accordance with Annex B;
- (c) Certificates and licences of the commanding officer, pilots and crew in accordance with Annex E;
- (d) If it carries passengers, a list of their names;
- (e) If it carries freight, bills of lading and manifest;
- (f) Log books in accordance with Annex C;

(g) If equipped with wireless, the special licence prescribed by Article 14.

ART. 20. The log books shall be kept for two years after the last entry.

ART. 21. Upon the departure or landing of an aircraft, the authorities of the country shall have, in all cases, the right to visit the aircraft and to verify all the documents with which it must be provided.

ART. 22. Aircraft of the contracting States shall be entitled to the same measures of assistance for landing, particularly in case of distress, as national aircraft.

ART. 23. With regard to the salvage of aircraft wrecked at sea the principles of maritime law will apply, in the absence of any agreement to the contrary.

ART. 24. Every aerodrome in a contracting State, which upon payment of charges is open to public use by its national aircraft, shall likewise be open to the aircraft of all other contracting States.

In every such aerodrome there shall be a single tariff of charges for landing and length of stay applicable alike to national and foreign aircraft.

ART. 25. Each contracting State undertakes to adopt measures to ensure that every aircraft flying above the limits of its territory and that every aircraft wherever it may be, carrying its nationality mark, shall comply with the regulations contained in Annex D.

Each of the contracting States undertakes to ensure the prosecution and punishment of all persons contravening these regulations.

CHAPTER VI

Prohibited Transport

ART. 26. The carriage by aircraft of explosives and of arms and munitions of war is forbidden in international navigation. No foreign aircraft shall be permitted to carry such articles between any two points in the same contracting State.

ART. 27. Each State may, in aerial navigation, prohibit or regulate the carriage or use of photographic apparatus. Any such regulations shall be at once notified to the International Commission for Air Navigation, which shall communicate this information to the other Contracting States.

ART. 28. As a measure of public safety, the carriage of objects other than those mentioned in articles 26 and 27 may be subjected to restrictions by any contracting State. Any such regulations shall be at once notified to the International Commission for Air Navigation, which shall communicate this information to the other contracting States.

ART. 29. All restrictions mentioned in Article 28 shall be applied equally to national and foreign aircraft.

CHAPTER VII

State Aircraft

ART. 30. The following shall be deemed to be State aircraft:

- (a) Military aircraft.
- (b) Aircraft exclusively employed in State service, such as posts, customs, police.

Every other aircraft shall be deemed to be a private aircraft.

All state aircraft other than military, customs and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present Convention.

ART. 31. Every aircraft commanded by a person in military service detailed for the purpose shall be deemed to be a military aircraft.

ART. 32. No military aircraft of a contracting State shall fly over the territory of another contracting State nor land thereon without special authorisation. In case of such authorisation the military aircraft shall enjoy, in principle, in the absence of special stipulation the privileges which are customarily accorded to foreign ships of war.

A military aircraft which is forced to land or which is requested or summoned to land shall by reason thereof acquire no right to the privileges referred to in the above paragraph.

ART. 33. Special arrangements between the States concerned will determine in what cases police and customs aircraft may be authorised to cross the frontier. They shall in no case be entitled to the privileges referred to in Article 32.

CHAPTER VIII

International Commission for Air Navigation

ART. 34. There shall be instituted, under the name of the International Commission for Air Navigation, a permanent Commission placed under the direction of the League of Nations and composed of:

Two Representatives of each of the following States: The United States of America, France, Italy and Japan;

One Representative of Great Britain and one of each of the British Dominions and of India;

One Representative of each of the other contracting States.

Each of the five States first-named (Great Britain, the British Dominions and India counting for this purpose as one State) shall have the least whole number of votes which, when multiplied by five, will give a product exceeding by at least one vote the total number of the votes of all the other contracting States.

All the States other than the first five named shall each have one vote.²

The International Commission for Air Navigation shall determine the rules of its own procedure and the place of its permanent seat, but it shall be free to meet in such places as it may deem convenient. Its first meeting shall take place at Paris. This meeting shall be convened by the French Government, as soon as a majority of the signatory States shall have notified to it their ratification of the present Convention.

The duties of this Commission shall be:

(a) To receive proposals from or to make proposals to any of the contracting States for the modification or amendment of the provisions of the present Convention, and to notify changes adopted;

(b) To carry out the duties imposed upon it by the present Article and by Articles 9, 13, 14, 15, 16, 27, 28, 36, and 37 of the present Convention;

(c) To amend the provisions of the Annexes A-G;

(d) To collect and communicate to the contracting States information of every kind concerning international air navigation;

(e) To collect and communicate to the contracting States all information relating to wireless telegraphy, meteorology and medical science which may be of interest to air navigation;

(f) To ensure the publication of maps for air navigation in accordance with the provisions of Annex F;

(g) To give its opinion on questions which the States may submit for examination.

Any modification of the provisions of any one of the Annexes may be made by the International Commission for Air Navigation when such modification shall have been approved by three fourths of the total possible votes which could be cast if all the States were represented³ and shall become effective from the time when it shall have been notified by the International Commission for Air Navigation to all the contracting States.

Any proposed modification of the Articles of the present Convention shall be examined by the International Commission for Air Navigation, whether it originates with one of the contracting States or with the Commission itself. No such modification shall be proposed for adoption by the contracting States, unless it shall have been approved by at least two-thirds of the total possible votes.

All such modifications of the Articles of the Convention (but not of the

² A *Protocol of Amendment*, in force December 14, 1926, substitutes for these paragraphs the provision: "Each State represented in the Commission (Great Britain, the British Dominions, and India counting for this purpose as one State) shall have one vote." *British Treaty Series*, No. 13 (1925) Cmd. 2329.—Ed.

³ The *Protocol* in force December 14, 1926, inserts here "this majority must, moreover, include at least three of the five following States: the United States of America, the British Empire, France, Italy, Japan. Such modification shall become effective."—Ed.

provisions of the Annexes) must be formally adopted by the contracting States before they become effective.

The expenses of organisation and operation of the International Commission for Air Navigation shall be borne by the contracting States ⁴ in proportion to the number of votes at their disposal.

The expenses occasioned by the sending of technical delegations will be borne by their respective States.

[Chapter IX, Final Provisions, is omitted, as are the Annexes.]

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QUESTIONS AND PROBLEMS

Students are urged to read all the materials in the chapter before attempting to answer the questions and problems.

1. What methods of acquiring territory does the Tribunal of the Permanent Court of Arbitration discuss in the case of *The Island of Palmas (Miangas)* (§ 43)? What method of acquisition is under special discussion here? Why does the Tribunal find it necessary to treat so largely of Spanish claims in an arbitration between the United States and the Netherlands?

Upon what events is the claim of the United States based? What are the dates of these events? What is the legal theory the United States sets up on these facts in order to support its claim?

Upon what events is the claim of the Netherlands based? What are the dates of these events? What is the legal theory the Netherlands sets up in order to support its claim?

What is the award of the Tribunal? What reasons does the Tribunal give for its award? Does the Tribunal weigh carefully the claims of both States and answer fully the claims of the losing side?

What is the principle of "inter-temporal law" to which the Tribunal refers? How was it applied in the award?

Formulate as carefully and as accurately as you can the legal principle applied by the Tribunal in its award.

2. The following case is before an arbitration tribunal. What should the tribunal decide? Give reasons.

"A small island, 30 miles from State Y, was discovered by Y navigators in 1600, and has been occasionally visited by seal fishers of Y until 1880.

"A statute of State X, passed in 1850, provides that citizens of State X, on discovering uninhabited islands on the high seas and not in the jurisdiction of any State, may petition to have them recorded in the foreign office; and if this is done may exploit their resources under protection of State X.

"In 1890, Captain A, a citizen of State X, and master of the ship *Pelican*, lands on the island and establishes a sealing station which he visits annually thereafter. He reports the island to the government of X and it is recorded as provided by the act of 1850.

"In 1900 the government of Y passes an act forbidding seal taking without license, in its territory or waters, under penalty of confiscation of all property engaged in such action.

"While engaged in seal fishing as usual, the *Pelican* is seized by a revenue cutter of State Y, two miles from the island, brought to a port of Y, and there condemned by decree of a court."—Adapted from *Examination for the Foreign Service*, Department of State: The American Foreign Service: General Information for Applicants and Sample Entrance Examination Questions (Washington, D. C., 1932) p. 62.

3. What was the question before the Court in *Fleming and Marshall v. Page* (§ 44)? How was this question decided? What was the Court's reasoning? Do you regard the Court's judgment as one primarily of international law, or of constitutional law? Was Tampico necessarily a part of Mexico—from the point of view of France, for example—because the American court regarded it as being in a foreign country?

Do invasion of a foreign country and occupation of parts of it by military forces constitute conquest? In the Court's view, what is necessary to constitute conquest?

Suppose that American forces had occupied all of Mexico, and the existing Mexican government had fled, leaving no constituted authority with which the United States could have concluded a treaty of peace. Would this have been conquest, or would some further action have been necessary?

4. What were the facts in the case of the *Anna* (§ 45)? What question of international law was presented by these facts? How was this question decided?

What was the nationality of the vessel making the capture? Of the vessel captured? Where was the capture made? Why was the place of making the capture important? If the capture had been made on the high seas, would it have been illegal? Why did the Court think it had been made within the jurisdiction of the United States?

Do you agree with the judgment and the reasoning?

5. What is the nature and purpose of the treaty in § 46? What territory was ceded to the United States? By whom? Did the ceding States have title to the territory? Explain. Exactly what items did the cession include? After the ratification of this treaty could the United States have enacted a law that none of the inhabitants of the acquired territory could ever become American citizens? What was the attitude of the treaty towards treaties entered into by previous sovereigns of the ceded territory? In 1805 could the United States have enacted a law forbidding access to ports in the ceded territory to all except American vessels? Could this have been done in 1825, under the treaty? Does the treaty refer to any other Convention? Explain. What is the distinction between "cession" and "sale"? Is this treaty one of sale?

6. What were the facts of the case in *American Banana Co. v. United Fruit Co.* (§ 47)? What did the Court decide? Why? Do you think this is a good principle? Discuss. Does this principle mean that persons who commit crimes in the United States and flee to other countries may not be tried in the United States? (See Chapter XI.) Does the principle prevent the United States from trying and punishing persons who commit crimes within the jurisdiction of other countries, if such persons are subsequently found within the United States? If an Italian national committed murder in Illinois, do you think he could escape trial in the Illinois courts by claiming his Italian nationality? What is the difference between the "personal theory" of law and the "territorial theory"? What consequences would this involve? What other theories are described in § 47?

7. Is the *Draft Convention on Jurisdiction with Respect to Crime* (§ 48) in itself international law? What would be its standing before an international tribunal? What is its character?

Suppose that the Draft Convention had been generally accepted by States. What States could assume jurisdiction under it in the following cases? Could more than one State assume jurisdiction?

- (a) A German national kills a Turkish national in Florida.
- (b) A Chinese ship commits acts of piracy on the high seas.
- (c) In England, counterfeit money is manufactured by a conspiracy of Russians for circulation in Paraguay.
- (d) A German transport plane crashes in Switzerland, damaging a house.
- (e) An American citizen by birth is apprehended in Germany and accused of criticizing the German Government in a speech delivered in the United States.
- (f) A French ship collides with a Turkish ship on the high seas. The French ship later comes within Turkish jurisdiction.
- (g) Japan seeks to try a Russian for an offense alleged to have been committed in France.
- (h) German nationals are kidnapped in Switzerland and brought to trial in Germany for offenses against the safety of the State.
- (i) Uruguay seeks to try a Brazilian national in his absence for conspiring to defraud a Uruguayan bank.

In any of these cases, could a State assume jurisdiction which did not have possession of the person of the offender? Is there a distinction here between nationals of the State assuming jurisdiction and aliens?

8. What is the legal character of the document in § 50 entitled *The Legal Status of the Territorial Sea*? Do you think this document contains everything it should contain? Did any State at the Conference for the Codification of International Law contend for a limit of *less* than three marine miles for the territorial sea? What significance, if any, has this? How would you state the rule of international law on the subject of the outward limits of the territorial sea? Could it have been stated in this way by the Conference? Can you suggest reasons why the Conference did not state the three-mile rule as a minimum limit? Does the wording of Article 1 prevent the application of the three-mile rule as a minimum limit?

What is the "right of passage"? Of "innocent passage"? What are the limitations upon this right? Is the right the same for merchant ships as for warships? Have you had any cases which would indicate the background of these rules?

9. A merchant vessel registered in but not the property of State A is passing through the territorial waters of State B. Suppose the *Annex* printed as § 50 to be international law, then could State B: (a) Require the ship to take a pilot of State B through a dangerous channel? (b) Prohibit the ship from fishing with seines? (c) Require inspection of the ship by authorities of State B to prevent smuggling? (d) Prohibit the playing of roulette on board the ship while in the territorial sea? (e) Require the ship to pay a tax for the maintenance of light-houses? (f) Require the surrender for trial of a person who had committed assault and battery on the ship while it was within territorial waters? (g) In case the ship collides with another ship within territorial waters, require the ship to put into a port of State B for trial? (h) Require the surrender of a person on board the ship who, engaging in target practice, accidentally wounds a person on shore of State B? Give reasons in each case.

10. You are the master of a United States revenue cutter which has just discovered a vessel suspected of rum-running about two and one-half marine miles from the American coast. What are your legal rights? What would be your rights if the suspected vessel were a submarine?

11. A French submarine is seen by a United States cruiser to come to the surface within the territorial waters of the United States, submerge, and twenty miles beyond come to the surface again. What may the commanding officer of the cruiser do? What are the respective rights of France and the United States?

12. Was the Court of Commissioners of Alabama Claims a national or an international tribunal? What question of international law arose before it in the case of the *Stetson v. United States* (§ 52)? Why was it necessary to settle this question in order to dispose of the case? How did the court settle this question?

Describe the geographic character of Chesapeake Bay. What is the ordinary rule as to the point where the high seas begin and the jurisdiction of the shore State ends? What was the original basis of this rule? Is the basis the same now? Explain. Is a marine mile the same as a statute mile? If the Court had applied this rule in this case, would the *Alleganean* have been within the jurisdiction of the United States or on the high seas? What would have been the disposition of the case in this event? Explain. Does the Court apply this rule?

Does the Court think that all of Chesapeake Bay is within the jurisdiction of the United States? What evidence does it use in reaching its conclusion? What was the case of the *Grange*? Did this case involve Chesapeake Bay? Did the Court think this case important? Explain. Do you think this is good reasoning? What does the Court mean when it says: "What injustice can be done to any other nation by the United States exercising sovereign control over these waters? What annoyance and what injury may not come to the United States through a failure to do so?" What do you think of this argument? Do you think such an argument is better than one which would contend that the ordinary rule of jurisdiction in the territorial seas should be applied? Explain.

Define a bay. Would you apply the rule of the Court in this case to the Bay of Biscay? Hudson Bay? The Gulf of Mexico? The Bay of Fundy? Do you think it would be possible to state a general rule of international law with respect to jurisdiction over bays?

13. In the case of *Arkansas v. Tennessee* (§ 53) are the parties States in the international sense of that word? What significance can the judgment in such a case have for international law? How did the case arise? What action did Arkansas ask the Court to take? What action did the Court take? With what reasoning did the Court support this action?

How did the Court go about establishing the original boundary line between Arkansas and Tennessee? What public acts and documents did it examine, and why? Did examination of these materials lead to the same or contradictory results? What were these results? Did they settle the questions before the Court?

What did the Court conclude was the true interpretation of "a line to be drawn along the middle of the . . . River Mississippi"? Did its conclusion agree on this point with the contentions of both parties? What is the *thalweg*? What are the reasons for the rule of the *thalweg*? What do you think of this, as against the rule that the line should always be equidistant from both shores of the river? From what sources does the Court draw the reasoning which it applies? Have these sources any significance?

What is the rule concerning the boundary when the river wears away the soil from one side (erosion) and deposits it on the other side (accretion)? Do you think this is a good rule? Is it the same as the rule when the river suddenly adopts a new course? Can you suggest reasons for the different rule in this case?

Can you justify the existence of two rules in this matter? Are the rules contradictory or not?

Where did the Court declare the boundary ran after the avulsion of 1876? Was the new line a land boundary or a water boundary? Was it the *thalweg*? What was the effect of the Court's judgment on the doctrine of the *thalweg*? On the reasons advanced justifying the rule of the *thalweg*? Do you think this result is justifiable? Might it lead to difficulties? Would these difficulties be the same between States of the United States as between nations? Explain.

14. What are the facts in the case of the *Schooner Exchange* (§ 54)? What is the precise question before the Court? How does it answer this question? Is the discussion of the Court confined to this question? What other questions does the Court discuss? Why do you think the Court felt it desirable to discuss these questions?

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute." Does this statement, taken by itself, explain the discussion and the decision in this case? Is it necessary to qualify the quoted statement? Does Chief Justice Marshall qualify it?

On her visit to the United States was Queen Marie of Roumania subject to the jurisdiction of the courts in the United States? To the political authorities? Explain. Suppose a Prince of Wales should visit the United States. Would he have any exemption from the local jurisdiction? Suppose he traveled incognito as plain Mr. Jones? Would the Ambassador of the French Republic to the United States be subject to the jurisdiction of the courts? (Compare on this point the documents in Chapter IX.)

If in the World War of 1914 Germany had requested permission for her troops to pass through Belgium on their way to invade France, and Belgium had consented, could Belgium, under the doctrines of this case, have then exercised any control over the German troops? Explain.

Why should a mere ship of France be given the same kind of privilege which would have been extended to Napoleon I, at that time Emperor of the French? Would a French subject have been given such a privilege if traveling in the United States? Explain. Did the ship have any special characteristics entitling it to the treatment the Court gave it? Explain.

Did the Court examine the title of Napoleon I to the vessel? Explain.

15. What was the judgment of the Judicial Committee of the Privy Council in *Chung Chi Cheung v. The King* (§ 54a)? Is this judgment consistent with that in the *Schooner Exchange* (§ 54)? Do you think the Chinese Government had waived its jurisdiction? Explain.

16. Compare *Chung Chi Cheung v. The King* (§ 54a) with *Wildenhus' Case* (§ 60). What are the similarities? What are the differences? Are the two cases contradictory? Explain.

17. What were the facts in the case of *Berizzi Brothers Company v. Steamship Pesaro* (§ 55)? What did the Court decide? What was the reasoning of the Court? Is the decision related in any way to that in the *Schooner Exchange*? Does the decision in this case extend or limit the doctrine of the *Schooner Exchange*? Is it the use to which a ship is put—e. g., use as a ship of war—or the fact of ownership by a government which determines whether it is to have a special status? Is any light thrown on this question by the case of *Briggs v.*

Light Boats? The Parlement Belge? Is the position of the British courts on this point the same as that of American courts?

Under this doctrine what would be the status in ports of the United States of ships carrying on trade from States in which foreign trade was a monopoly of the government and all ships engaged in such trade were owned and operated by government agencies? Would this have any effect on the willingness of persons in the United States to engage in trade in which such ships were occupied? Discuss. Are there any States in which the situation described obtains?

18. Do you think the Convention signed at Brussels, April 10, 1926 (§ 56) should be generally ratified? Discuss the provisions of this Convention.

19. What were the facts in the case of the *S.S. Wimbledon* (§ 57)? What was the judgment of the Court? How did the Court justify this judgment? Did the Court rely on general international law, or on the provisions of a particular treaty? Do you think that if there had been no Treaty of Versailles, the judgment of the Court would have been the same? Explain. Does this case shed any light on the general question of exemptions from the jurisdiction of a State? Explain. Did the Court think that the provisions of Article 380 of the Treaty of Versailles impaired the sovereignty of Germany? Do you agree with this position? What is the legal position of the Suez Canal? Of the Panama Canal? Does the Court establish the legal positions of these canals by reference to general principles of international law, or to the terms of particular treaties? How does the Court use the position of the Suez and Panama canals to support its judgment on the Kiel Canal?

What is a servitude? What does the Court think of servitudes? Did the Court think that Article 380 imposed a servitude upon Germany?

State as well as you can what appears to be the German argument based on its neutrality? Do you think there was any basis for this argument in international law (compare Chapter XVIII)? What did the Court do with this argument? Do you think the position of the Court is correct? Do you think the judgment of the Court impaired the right of Germany to be neutral? Did it release Germany from the general obligations of a neutral? Discuss.

20. What are the facts in *Wildenhus' Case* (§ 60)? What question of international law did the Supreme Court have to decide? What was its decision? Was the problem before the Supreme Court the same as that dealt with in Articles 4-10 of § 50?

Did the Court rely more on treaties or on international custom? How could the Court resort to a treaty between the United States and Belgium in deciding on the validity of an act of the authorities of Jersey City, New Jersey? Precisely what did the treaty with Belgium provide? Did a simple reading of this treaty dispose of the question before the Court, or was further interpretation required? Do you think the facts of the case were actually such as to establish "a disorder . . . of such a nature as to disturb tranquillity and public order on shore or in the port," as required in the treaty? What did the Court think? Do you agree with its reasoning? Did the courts of any other country reason the same way? Was the case of *Jally* identical in principle with the case of *Wildenhus*? What evidence is there that this case exemplifies a principle of international law?

Accepting the application of the treaty in *Wildenhus' Case* as correct, suppose the murder had occurred while the *Noordland* was passing through the American territorial sea. Would the principle announced by the Court require

the New Jersey authorities to try Wildenhus? Would the case have been different if the murder had occurred on the voyage *in* to Jersey City from what it would have been if it occurred on the voyage *out* of Jersey City back, say, to a Belgian port? Compare § 50.

21. What were the facts in the case of *Regina v. Anderson* (§ 61)? Where was Anderson being tried? What was the precise question before the Court and how was it decided? Of what country was Anderson a citizen? In the opinion of the judges could he have been tried there? Explain. Could he have been tried in any other country? Explain. Do any other cases you have studied throw any light on these matters? Do you think the remarks of the judges on Anderson's relations to other jurisdictions than the English were necessary to the Court's judgment? Explain.

22. Read the case of *United States v. Santos Flores* (1933) 289 U. S. 137. In what respects is this case similar to *Regina v. Anderson*? In what respects is it different? Do you think that if the United States Supreme Court had had before it a set of facts entirely like those in *Regina v. Anderson* (§ 61) it would have decided them in the same way? Explain.

23. What is the Judicial Committee of the Privy Council to which the question concerning piracy (§ 62) was referred? What was this question? What was the Committee's answer? Did this answer serve to settle any case before any Court? Of what use was it?

Do you think the opinion is of value to a student mainly because of its answer to the question, or for other reasons? Explain.

What is meant by the expression "piracy by *jure gentium*" and "piracy by statute"? Is there any difference? What is meant by such expressions as "*hostis humani generis*" and "*animus furandi*"? Who has the right to capture a pirate? Does this right to capture exist in times of peace? Compare the position of a pirate vessel with that of an ordinary merchant vessel on the high seas.

Of what importance are the following elements in the determination of pirates: (1) robbery, (2) depredation, (3) attempt to commit robbery or depredation, (4) intent but not attempt to commit robbery or depredation, (5) the place where the act occurs, (6) the fact whether the vessel is commissioned or not, (7) the intent to commit depredations, not only against the ships of one nation, but against the ships of all.

Does the opinion of the Judicial Committee discuss the penalty for piracy? What law determined that Captain Kidd should hang? Do you suppose that the *jure gentium* prescribed his hanging? Does your answer afford any clue to the difference between piracy *jure gentium* and piracy by statute?

Enumerate the different sources the opinion draws on for definitions of piracy *jure gentium*. Does this throw any light on the problems discussed in Chapter II?

24. Under the *Convention Relating to the Regulation of Aerial Navigation* (§ 63), what State has jurisdiction in the air space? Is this jurisdiction limited in any way? What is meant by the Convention's reference to "freedom of innocent passage" in Article 2? Would it be possible to indicate this without reference to the other terms of the Convention? Explain.

25. Under the *Convention Relating to the Regulation of Aerial Navigation* (§ 63), explain the legal rights and duties of a civil aircraft duly registered under

the laws of State X, in the following cases: (a) flying over State Y with a small cargo of machine guns; (b) flying over a fort in State Y; (c) flying over a route in State Y which State Y has not designated as an airway; (d) flying over the high seas; (e) flying over State Y with a moving-picture camera; (f) carrying cargo between two airports in State Y; (g) flying above State Y with radio apparatus operated by passengers; (h) landing at aerodrome in State Y where it is charged a higher rate for services than are civil aircraft of State Y; (i) developing engine trouble which compels descent on a military area of State Y; (j) flying over a metropolitan area of State Y, flight over which has been prohibited by State Y to the aircraft of all States save those of its ally, State Q.

26. How are the following aircraft of State X, flying over State Y, to be treated under the *Convention* in § 63: (a) plane used for experimental purposes by the engineering department of a state university; (b) plane used by Minister of War on business trips; (c) plane owned personally by a wealthy member of the Naval Reserve who has served three years on a naval aircraft carrier; (d) plane used as a rum runner; (e) pursuit plane of the army air force; (f) plane flown by a detective on the police force of a municipality; (g) courier plane of the Bank of State X?

27. The United States has not ratified the *Convention Relating to the Regulation of Aerial Navigation* (§ 63). What treatment should State X accord to a registered American private plane?

What documents should a plane possess which is to fly from State X to State Y? Explain the nature of these documents. Why are they required? When is a plane of State X bound to descend if over State Y? Is such a plane entitled to object to inspection of its documents?

28. Describe the International Commission for Air Navigation (§ 63). What is its composition? What are the functions of the Commission? How may the *Convention Relating to the Regulation of Air Navigation* be changed?

Do you think the Convention contains a reasonably complete statement of principles? How, for example, would it compare with the document (§ 50) you have studied on the *Legal Status of the Territorial Sea*? Can you suggest any reason why this Convention is so widely accepted, while the *Annex on the Legal Status of the Territorial Sea* is not? Would this Convention be a good example of "the codification of international law"? Explain. Do you think it would be easier to "codify" old questions, or new ones? In advance of controversies or after controversies have arisen?

Do you think that this Convention applies in wartime? Compare § 159.

VII

State Continuity and Succession

§ 64. STATE CONTINUITY: CHANGE IN FORM OF GOVERNMENT

The case below deals with the question whether, because of a change in its form of government, a State loses the identity which permits it to sue in the courts of a foreign State.

The Sapphire

SUPREME COURT OF THE UNITED STATES, 1871

11 Wallace, 164.

This was an appeal from the Circuit Court of the United States for the District of California.

The case was one of collision between the American ship *Sapphire* and the French transport *Euryale*, which took place in the harbor of San Francisco, on the morning of December 22, 1867, by which the *Euryale* was considerably damaged. A libel was filed in the District Court two days afterwards, in the name of the *Emperor Napoleon III*, then Emperor of the French, as owner of the *Euryale*, against the *Sapphire*. The claimants filed an answer, alleging, among other things, that the damage was occasioned by the fault of the *Euryale*. Depositions were taken, and the court decreed in favor of the libellant, and awarded him \$15,000, the total amount claimed. The claimants appealed to the Circuit Court, which affirmed the decree. They then, in July, 1869, appealed to this court. In the summer of 1870, Napoleon III was deposed. The case came on to be argued here February 16, 1871. Three questions were raised:

1. The right of the Emperor of France to have brought suit in our courts.
2. Whether, if rightly brought, the suit had not become abated by the deposition of the Emperor Napoleon III.

3. The question of merits . . . [The court's discussion of this question is omitted.]

Mr. Justice BRADLEY delivered the opinion of the court.

The first question raised is as to the right of the French Emperor to sue in our courts. On this point not the slightest difficulty exists. A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling. Such a suit was sustained in behalf of the King of Spain in the third circuit by Justice Washington and Judge Peters in 1810. *King of Spain v. Oliver*, 2 Washington's Circuit Court, 431. The Constitution expressly extends the judicial power to controversies between a State, or citizens thereof, and *foreign States*, citizens, or subjects, without reference to the subject-matter of the controversy. Our own government has largely availed itself of the like privilege to bring suits in the English courts in cases growing out of our late civil war. Twelve or more of such suits are enumerated in the brief of the appellees, brought within the last five years in the English law, chancery, and admiralty courts. There are numerous cases in the English reports in which suits of foreign sovereigns have been sustained, though it is held that a sovereign cannot be forced into court by suit.¹

The next question is, whether the suit has become abated by the recent deposition of the Emperor Napoleon. We think it has not. The reigning sovereign represents the national sovereignty, and that sovereignty is continuous and perpetual, residing in the proper successors of the sovereign for the time being. Napoleon was the owner of the *Euryale*, not as an individual, but as sovereign of France. This is substantially averred in the libel. On his deposition the sovereignty does not change, but merely the person or persons in whom it resides. The foreign state is the true and real owner of its public vessels of war. The reigning Emperor, or National Assembly, or other actual person or party in power, is but the agent and representative of the national sovereignty. A change in such representative works no change in the national sovereignty or its rights. The next successor recognized by our government is competent to carry on a suit already commenced and receive the fruits of it. A deed to or treaty with a sovereign as such enures to his successors in the government of the country. If a substitution of names is necessary or proper it is a formal matter, and can be made by the court

¹ *King of Spain v. Hullett*, 1 Dow & Clarke, 169; S. C., 1 Clarke & Fennelly, 333; S. C., 2 Bligh, N. S. 31; Emperor of Brazil, 6 Adolphus & Ellis, 801; Queen of Portugal, 7 Clarke & Fennelly, 466; King of Spain, 4 Russell, 225; Emperor of Austria, 3 De Gex, Fisher & Jones, 174; King of Greece, 6 Dowling's Practice Cases, 12; S. C., 1 Jurist, 944; United States, Law Reports, 2 Equity Cases, 659; Ditto, lb. 2 Chancery Appeals, 582; *Duke of Brunswick v. King of Hanover*, 6 Beavan, 1; S. C., 2 House of Lords Cases, 1; *De Haber v. Queen of Portugal*, 17 Q. B. 169; also 2 Phillimore's International Law, part vi, chap. 1; 1 Daniel's Chancery Practice, chap. ii, § ii.

under its general power to preserve due symmetry in its forms of proceeding. No allegation has been made that any change in the real and substantial ownership of the *Euryale* has occurred by the recent devolution of the sovereign power. The vessel has always belonged and still belongs to the French nation.

If a special case should arise in which it could be shown that injustice to the other party would ensue from a continuance of the proceedings after the death or deposition of a sovereign, the court, in the exercise of its discretionary power, would take such order as the exigency might require to prevent such a result. . . . Decree of the Circuit Court REVERSED. . . .

§ 65. CONTINUING STATE IDENTITY AND SUCCESSION TO TREATIES: CASE OF FEDERATION

That changes in the form of government of a State do not change its international identity is indicated in the case of the *Sapphire*, printed just above; but extensive changes in constitutional organization, especially when they involve control over new territory, may lead to very perplexing questions. *Terlinden v. Ames*, printed below, deals with the question whether treaties made by a State are binding upon it when it becomes part of a larger State.

Terlinden v. Ames

UNITED STATES SUPREME COURT, 1902

184 U. S. 270.

MR. CHIEF JUSTICE FULLER . . . delivered the opinion of the court.

The treaty of June 16, 1852, between the United States and the Kingdom of Prussia, and other States of the Germanic Confederation included in or which might accede to that convention, provided that the parties thereto should upon requisition "deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged papers, or the fabrication or circulation of counterfeit money, whether coin or paper money, or the embezzlement of public moneys, committed within the jurisdiction of either party, shall seek an asylum, or shall be found within the territories of the other." 10 Stat. 964, 966.

Pursuant to § 5270 of the Revised Statutes (and the acts from which that section was brought forward) complaint was duly made before a commissioner appointed and authorized by the District Court of the United States for the Northern District of Illinois to hear applications for extradition and to issue warrants therefor, charging Terlinden with having as a subject of the Kingdom of Prussia, and within the jurisdiction of that Kingdom,

committed the crimes of forgery, counterfeiting and the utterance of forged instruments, and with being a fugitive from the justice of said Kingdom. . . .

The commissioner issued his warrant and Terlinden was apprehended, whereupon and before the commissioner had entered upon the hearing, Terlinden petitioned and obtained from the District Court the writ of *habeas corpus* under consideration. . . .

In this case the writ of *habeas corpus* was issued before the examination by the commissioner had been entered upon, and his jurisdiction was the only question raised. If he had jurisdiction, the District Court could not interfere, and he had jurisdiction if there was a treaty and the commission of extraditable offences was charged. . . .

This brings us to the real question, namely, the denial of the existence of a treaty of extradition between the United States and the Kingdom of Prussia, or the German Empire. In these proceedings the application was made by the official representative of both the Empire and the Kingdom of Prussia, but was based on the extradition treaty of 1852. The contention is that, as the result of the formation of the German Empire, this treaty had been terminated by operation of law.

Treaties are of different kinds and terminable in different ways. The fifth article of this treaty provided, in substance, that it should continue in force until 1858, and thereafter until the end of a twelve months' notice by one of the parties of the intention to terminate it. No such notice has ever been given, and extradition has been frequently awarded under it during the entire intervening time.

Undoubtedly treaties may be terminated by the absorption of Powers into other Nationalities and the loss of separate existence, as in the case of Hanover and Nassau, which became by conquest incorporated into the Kingdom of Prussia in 1866. Cessation of independent existence rendered the execution of treaties impossible. But where sovereignty in that respect is not extinguished, and the power to execute remains unimpaired, outstanding treaties cannot be regarded as avoided because of impossibility of performance.

This treaty was entered into by His Majesty the King of Prussia in his own name and in the names of eighteen other States of the Germanic Confederation, including the Kingdom of Saxony and the free city of Frankfort, and was acceded to by six other States, including the Kingdom of Würtemberg, and the free Hanseatic city of Bremen, but not including the Hanseatic free cities of Hamburg and Lübeck. The war between Prussia and Austria in 1866 resulted in the extinction of the Germanic Confederation and the absorption of Hanover, Hesse Cassel, Nassau and the free city of Frankfort, by Prussia.

The North German Union was then created under the praesidium of

the Crown of Prussia, and our minister to Berlin, George Bancroft, thereupon recognized officially not only the Prussian Parliament, but also the Parliament of the North German United States, and the collective German Customs and Commerce Union, upon the ground that by the paramount constitution of the North German United States, the King of Prussia, to whom he was accredited, was at the head of those several organizations or institutions; and his action was entirely approved by this Government. Messages and Documents, Dep. of State, 1867-8, Part I, p. 601; Dip. Correspondence, Secretary Seward to Mr. Bancroft, Dec. 9, 1867.

February 22, 1868, a treaty relative to naturalization was concluded between the United States and His Majesty, the King of Prussia, on behalf of the North German Confederation, the third article of which read as follows: "The convention for the mutual delivery of criminals, fugitives from justice, in certain cases, concluded between the United States on the one part and Prussia and other States of Germany on the other part, the sixteenth day of June, one thousand eight hundred and fifty-two, is hereby extended to all the States of the North German Confederation." 15 Stat. 615. This recognized the treaty as still in force, and brought the Republics of Lübeck and Hamburg within its scope. Treaties were also made in that year between the United States and the Kingdoms of Bavaria and Würtemberg, concerning naturalization, which contained the provision that the previous conventions between them and the United States in respect of fugitives from justice should remain in force without change.

Then came the adoption of the Constitution of the German Empire. It found the King of Prussia, the chief executive of the North German Union, endowed with power to carry into effect its international obligations, and those of his kingdom, and it perpetuated and confirmed that situation. The official promulgation of that Constitution recited that it was adopted instead of the Constitution of the North German Union, and its preamble declared that "His Majesty the King of Prussia, in the name of the North German Union, His Majesty the King of Bavaria, His Majesty the King of Würtemberg, His Highness the Grand Duke of Baden, and His Royal Highness the Grand Duke of Hesse and by Rhine for those parts of the Grand Duchy of Hesse which are situated south of the Main, conclude an eternal alliance for the protection of the territory of the Confederation, and of the laws of the same, as well as for the promotion of the welfare of the German people." As we have heretofore seen, the laws of the Empire were to take precedence of those of the individual States, and it was vested with the power of general legislation in respect of crimes.

Article 11 read "The King of Prussia shall be the president of the Confederation, and shall have the title of German Emperor. The Emperor shall represent the Empire among nations, declare war, and conclude peace in the

name of the same; enter into alliances and other conventions with foreign countries, accredit ambassadors, and receive them. . . . So far as treaties with foreign countries refer to matters which, according to Article IV, are to be regulated by the legislature of the Empire, the consent of the Federal Council shall be required for their ratification, and the approval of the Diet shall be necessary to render them valid."

It is contended that the words in the preamble translated "an eternal alliance" should read "an eternal union," but this is not material, for admitting that the Constitution created a composite State instead of a system of confederated States, and even that it was called a confederated Empire rather to save the *amour propre* of some of its component parts than otherwise, it does not necessarily follow that the Kingdom of Prussia lost its identity as such, or that treaties theretofore entered into by it could not be performed either in the name of its King or that of the Emperor. We do not find in this constitution any provision which in itself operated to abrogate existing treaties or to affect the status of the Kingdom of Prussia in that regard. Nor is there anything in the record to indicate that outstanding treaty obligations have been disregarded since its adoption. So far from that being so, those obligations have been faithfully observed.

And without considering whether extinguished treaties can be renewed by tacit consent under our Constitution, we think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance. During the period from 1871 to the present day, extradition from this country to Germany, and from Germany to this country, has been frequently granted under the treaty, which has thus been repeatedly recognized by both governments as in force. Moore's Report on Extradition with Returns of all Cases, 1890.

In 1889, in response to a request for information on international extradition as practiced by the German Government, the Imperial Foreign Office transmitted to our chargé at Berlin a memorial on the subject, in the note accompanying which it was said: "The questions referred to, in so far as they could not be uniformly answered for all the confederated German States, have been answered in that document as relating to the case of applications for extradition addressed to the Empire or Prussia." It was stated in the memorial, among other things:

"In so far as by-laws and treaties of the Empire relating to the extradition of criminals, provisions which bind all the States of the union have not been made, those States are not hindered from independently regulating extradition by agreements with foreign States, or by laws enacted for their own territory.

"Of conventions, some of an earlier, some of a later period, for the extradition of criminals, entered into by individual States of the union with

various foreign States, there exist a number, and in particular such with France, the Netherlands, Austria-Hungary, and Russia. With the United States of America, also, extradition is regulated by various treaties, as, besides the treaty of June 16, 1852, which applies to all of the States of the former North German Union, and also to Hesse, south of the Main, and to Württemberg, there exist separate treaties with Bavaria and Baden, of September 12, 1853, and January 30, 1857, respectively." Moore's Report, 93, 94.

Thus it appears that the German Government has officially recognized, and continues to recognize, the treaty of June 16, 1852, as still in force, as well as similar treaties with other members of the Empire, so far as the latter has not taken specific action to the contrary or in lieu thereof. And see Laband, *Das Staatsrecht des Deutschen Reiches* (1894), 122, 123, 124, 142.

It is out of the question that a citizen of one of the German states, charged with being a fugitive from its justice, should be permitted to call on the courts of this country to adjudicate the correctness of the conclusions of the Empire as to its powers and the powers of its members, and especially as the Executive Department of our Government has accepted these conclusions and proceeded accordingly.

The same is true as respects many other treaties of serious moment, with Prussia, and with particular States of the Empire, and it would be singular, indeed, if after the lapse of years of performance of their stipulations, these treaties must be held to have terminated because of the inability to perform during all that time of one of the parties.

In the notes accompanying the State Department's compilation of Treaties and Conventions between the United States and other Powers, published in 1889, Mr. J. C. Bancroft Davis treats of the subject thus:

"The establishment of the German Empire in 1871, and the complex relations of its component parts to each other and to the Empire, necessarily give rise to questions as to the treaties entered into with the North German Confederation and with many of the States composing the Empire. It cannot be said that any fixed rules have been established.

"Where a State has lost its separate existence, as in the case of Hanover and Nassau, no questions can arise.

"Where no new treaty has been negotiated with the Empire, the treaties with the various States which have preserved a separate existence have been resorted to.

"The question of the existence of the extradition treaty with Bavaria was presented to the United States District Court, on the application of a person accused of forgery committed in Bavaria, to be discharged on *habeas corpus*, who was in custody after the issue of a mandate, at the request of the minister of Germany. The court held that the treaty was admitted by both governments to be in existence.

"Such a question is, after all, purely a political one."

The case there referred to is that of *In re Thomas*, 12 Blatch. 370, in which the continuance of the extradition treaty with Bavaria was called in question, and Mr. Justice Blatchford, then District Judge, said:

"It is further contended, on the part of Thomas, that the convention with Bavaria was abrogated by the absorption of Bavaria into the German Empire. An examination of the provisions of the Constitution of the German Empire does not disclose anything which indicates that then existing treaties between the several States composing the confederation called the German Empire, and foreign countries, were annulled, or to be considered as abrogated.

"Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, without the consent of the United States. Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture. 1 Kent's Com. 174. In the present case the mandate issued by the Government of the United States shows that the convention in question is regarded as in force both by the United States and by the German Empire, represented by its envoys, and by Bavaria, represented by the same envoy. The application of the foreign government was made through the proper diplomatic representative of the German Empire and of Bavaria, and the complaint before the commissioner was made by the proper consular authority representing the German Empire and also representing Bavaria."

We concur in the view that the question whether power remains in a foreign State to carry out its treaty obligations is in its nature political and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard. . . .

If it be assumed in the case before us, and the papers presented on the motion for a stay advise us that such is the fact, that the commissioner, on hearing, deemed the evidence sufficient to sustain the charges, and certified his findings and the testimony to the Secretary of State, and a warrant for the surrender of Terlinden on the proper requisition was duly issued, it cannot be successfully contended that the courts could properly intervene on the ground that the treaty under which both governments had proceeded, had terminated by reason of the adoption of the constitution of the German Empire, notwithstanding the judgment of both governments to the contrary.

The decisions of the Executive Department in matters of extradition, within its own sphere, and in accordance with the Constitution, are not open

to judicial revision, and it results that where proceedings for extradition, regularly and constitutionally taken under the acts of Congress, are pending, they cannot be put an end to by writs of *habeas corpus*.

The District Court was right, and its final order is

Affirmed.

§ 66. STATE CONTINUITY AND SUCCESSION

NOTE BY THE EDITOR

The identity of a State remains the same even under a *de facto* government, at least for certain purposes. This may be true even as against the subjects of a State which does not recognize such *de facto* government. In the Tinoco Arbitration between Great Britain and Costa Rica,¹ the Arbitrator held as valid the Law of Nullities enacted by the Tinoco Government of Costa Rica, which was never recognized by Great Britain, though this law annulled both indebtedness and concessions to British corporations. This was because, from the evidence, "the Tinoco government was an actual sovereign government." Under it, the identity of the State of Costa Rica remained the same.

Terlinden v. Ames suggests the close connection which exists between questions of the continuing identity of States, and what is sometimes called "State succession" in the case of treaties. Before considering "State succession," however, it is necessary to point out certain facts as to the effect of the acquisition or loss of territory upon State identity.

Transfers of territory from one State to another do not in themselves change the identity of either State. Nevertheless, when the whole of one State has been absorbed into another, as in the *Anschluss* of 1938 between Germany and Austria, it is correct to regard the identity of Germany as continuing, and that of Austria as having been extinguished as a subject of international law. Strange cases exist: for example, the present Kingdom of Italy regards itself as the same entity as the former Kingdom of Piedmont, whose increased size is due to successive annexations of other Italian States, yet it is easy to contend that the Kingdom of Italy is a new State formed by a union among the Italian States, Piedmont among others. Other problems of identity arise when an existing State breaks up in such a way that several States occupy its territory. Authorities differ as to whether pre-*Anschluss* Austria was the same State as the prewar Austria-Hungary. Brierly says that it was "probably a new State, and not the old Empire of Austria-Hungary with a new form of government and a reduced territorial extent."² But,

¹ Reported in 18 *A.J.I.L.* (1924), 147.

² *Law of Nations* (1928), p. 85.

though prewar Turkey lost large territories to a number of new States in the peace settlement, it is still regarded as the same State.

Whenever there is a transfer of territory, however, questions arise as to the responsibility for meeting the international obligations connected with the territory transferred. This will be true whether the transfer involves the extinction of a State or not. It has been common to speak of these changes in responsibility as "State succession," but there is an increasing tendency to avoid this term, since it has become very clear that the phenomena are not governed by the same rules as "succession" to property by individual persons in private law, and that the distribution of responsibility is very largely made by separate and detailed treaty arrangements in particular cases. The complexity of the subject is unrivaled, and it is practically impossible to state "rules of international law." Says E. Feilchenfeld, concluding in one significant study his consideration of another:³

As some of the leading authorities still deny that there is any positive rule of law on the subject, and as others assert that a whole body of law has grown up which governs each detail of the treatment of debts in case of state succession, the subject remains as controversial as ever. There is an increasing tendency to admit that, while no strict rules of law exist, there are certain principles of equity which should apply, and which provide that in all cases of state succession some allocation or distribution of debts should take place. No agreement has, however, been reached on the question what these principles of equity are, and what effects they should have on the details of financial settlements. This applies even to the rule of maintenance, the application of which in matters of state succession the author regards as mandatory.⁴

It is not difficult to make similar statements about aspects of "State succession" other than public debts. Consequently, the materials in this chapter are to be regarded as examples of legal solutions of specific type problems, rather than the embodiment of general "rules of international law."⁵ Some discussion seems required, however, of "succession" to (1) Treaties, (2) State Property, (3) Contracts (including Debt Contracts), and (4) Wrongs (or Torts).

1. *Treaties*.—In general, as suggested in *Terlinden v. Ames*, treaties follow the identity of the State. The mere acquisition or loss of territory has no effect on them. The State acquiring new territory and the State ceding the territory are alike still bound by treaties entered into before the acquisi-

³ A. N. Sack, *Effects of Transformations of States upon Their Public Debts* (Paris, 1927).

⁴ *Public Debts and State Succession* (Bureau of International Research, Harvard University, 1931), p. 575.

⁵ For an interesting discussion of some of these problems in a recent instance, see Garner, "Questions of State Succession Raised by the German Annexation of Austria," 32 *A.J.I.L.* (1938), 421.

tion. If the acquisition of territory involves the extinction of the State previously controlling it, treaties of the extinguished State are extinguished with it. This is the accepted rule with respect to purely political treaties, like treaties of alliance; and practice affords little support for the idea that the acquiring State is bound by nonpolitical or commercial obligations of the extinguished State. This is not to say that the acquiring State is not at liberty to enter into obligations of its own embodying "rights" of third States embodied in such treaties; but only that there is no obligation under international law requiring it to do so. It is sometimes contended that "dispositive" treaties, laying certain restrictions on the *territory* to which they relate, rather than on the *States* making them—like treaties of neutralization, or treaties establishing "servitudes"—bind States subsequently acquiring the territory concerned. In view of the reluctance of international tribunals to accept the idea of international servitudes, and to regard treaty obligations as not "real," but "personal" (see *The Wimbledon*, reprinted as § 57, and discussion following), it is difficult to accept this contention.

2. State property.—Treaties of cession usually provide that public buildings, public lands, public funds on deposit, and in general all State property of the ceding State within the territory which changes hands, become the property of the acquiring State. This is true only to the extent that it is the property of the ceding State, however; public property of local public authorities remains in their hands, subject, however, to the power of the acquiring State to make new arrangements concerning it. (See §§ 72, 73.) The same principle holds when a State is extinguished. On the failure of an attempted revolt, property of the revolutionary authorities passes into the hands of the State which has successfully re-established its authority, even though there is no treaty concerning it.⁶ Ordinarily, where the transfer of territory is provided for by treaty, specific provision is made according to the principles above, but there seems to be little question that the treaty might apply other principles.

§ 67. SUCCESSION TO CONTRACTS (DEBT): CASE OF PARTITION

One of the results of the war was the dismemberment of the former Austro-Hungarian monarchy, as a result of which it became necessary to apportion the debts of that State among the separate States holding parts of the territory of Austria-Hungary under the new settlement. The successor States were (a) Austria and Hungary, now separated; (b) Czechoslovakia, a new State carved mostly out of former Austro-Hungarian territory; (c) Poland, a State recreated

⁶ *U. S. v. Prioleau* (1866), 2 H. & M. 563, and *U. S. v. McRae* (1869), L. R. 8 Eq. 69; but see *Irish Free State v. Guaranty Safe Deposit Co.* (1927), 222 N. Y. S. 1927.

in part out of former Austro-Hungarian territory; (d) Yugoslavia, a State created by adding some former Austro-Hungarian territory to the prewar State of Serbia; (e) Roumania, a prewar State which received a considerable slice of former Austro-Hungarian and Russian territory.

Printed below are certain articles from the Treaty of the Principal Allied and Associated Powers with Austria, in which the principles governing the apportionment of the debt of the Austro-Hungarian Monarchy are indicated. Article 204 also suggests the attitude of the contracting States as to the payment of local debts.

Treaty of Peace Between the Principal Allied and Associated Powers and Austria

SIGNED SEPTEMBER 10, 1919

3 *United States Treaties and Conventions*, 3149, at 3218 ff.

ARTICLE 203

1. Each of the States to which territory of the former Austro-Hungarian Monarchy is transferred, and each of the States arising from the dismemberment of that Monarchy, including Austria, shall assume responsibility for a portion of the debt of the former Austrian Government which is specifically secured on railways, salt mines or other property, and which was in existence on July 28, 1914. The portion to be so assumed by each State shall be such portion as in the opinion of the Reparation Commission represents the secured debt in respect of the railways, salt mines and other properties transferred to that State under the terms of the present Treaty or any treaties or agreements supplementary thereto.

The amount of the liability in respect of secured debt so assumed by each State, other than Austria, shall be valued by the Reparation Commission, on such basis as the Commission may consider equitable, and the value so ascertained shall be deducted from the amount payable by the State in question to Austria in respect of property of the former or existing Austrian Government which the State acquires with the territory. Each State shall be solely responsible in respect of that portion of the secured debt for which it assumes responsibility under the terms of this Article, and holders of the debt for which responsibility is assumed by States other than Austria shall have no recourse against the Government of any other State.

Any property which was specifically pledged to secure any debt referred to in this Article shall remain specifically pledged to secure the new debt. But in case the property so pledged is situated as the result of the present Treaty in more than one State, that portion of the property which is situated in a particular State shall constitute the security only for that part of the debt which is apportioned to that State, and not for any other part of the debt.

For the purposes of the present Article there shall be regarded as secured

debt payments due by the former Austrian Government in connection with the purchase of railways or similar property; the distribution of the liability for such payments will be determined by the Reparation Commission in the same manner as in the case of secured debt.

Debts for which the responsibility is transferred under the terms of this Article shall be expressed in terms of the currency of the State assuming the responsibility, if the original debt was expressed in terms of Austro-Hungarian paper currency. For the purposes of this conversion the currency of the assuming State shall be valued in terms of Austro-Hungarian paper kronen at the rate at which those kronen were exchanged into the currency of the assuming State by that State when it first substituted its own currency for Austro-Hungarian kronen. The basis of this conversion of the currency unit in which bonds are expressed shall be subject to the approval of the Reparation Commission, which shall, if it thinks fit, require the State effecting the conversion to modify the terms thereof. Such modification shall only be required if, in the opinion of the Commission, the foreign exchange value of the currency unit or units substituted for the currency unit in which the old bonds are expressed is substantially less at the date of the conversion than the foreign exchange value of the original currency unit.

If the original Austrian debt was expressed in terms of a foreign currency or foreign currencies, the new debt shall be expressed in terms of the same currency or currencies.

If the original Austrian debt was expressed in terms of Austro-Hungarian gold coin, the new debt shall be expressed in terms of equivalent amounts of pounds sterling and gold dollars of the United States of America, the equivalents being calculated on the basis of the weight and the fineness of gold of the three coins as enacted by law on January 1, 1914.

Any foreign exchange options, whether at fixed rates or otherwise, embodied explicitly or implicitly in the old bonds shall be embodied in the new bonds also.

2. Each of the States to which territory of the former Austro-Hungarian Monarchy is transferred, and each of the States arising from the dismemberment of that Monarchy, including Austria, shall assume responsibility for a portion of the unsecured bonded debt of the former Austrian Government which was in existence on July 28, 1914, calculated on the basis of the ratio between the average for the three financial years 1911, 1912, 1913, of such revenues of the distributed territory and the average for the same years of such revenues of the whole of the former Austrian territories as in the judgment of the Reparation Commission are best calculated to represent the financial capacity of the respective territories. In making the above calculation the revenues of Bosnia and Herzegovina shall not be included.

The responsibilities in respect of bonded debt to be assumed under the

terms of this Article shall be discharged in the manner laid down in the Annex hereto.

The Austrian Government shall be solely responsible for all the liabilities of the former Austrian Government incurred prior to July 28, 1914, other than those evidenced by the bonds, bills, securities, and currency notes which are specifically provided for under the terms of the present Treaty.

Neither the provisions of this Article nor the provisions of the Annex hereto shall apply to securities of the former Austrian Government deposited with the Austro-Hungarian Bank as security for the currency notes issued by that bank. . . .

ARTICLE 204

1. In case the new boundaries of any States, as laid down by the present Treaty, shall divide any local area which was a single unit for borrowing purposes and which had a legally constituted public debt, such debt shall be divided between the new divisions of the area in a proportion to be determined by the Reparation Commission in accordance with the principles laid down for the re-apportionment of Government debts under Article 203, and the responsibility so assumed shall be discharged in such a manner as the Reparation Commission shall determine.

2. The public debt of Bosnia and Herzegovina shall be regarded as the debt of a local area and not as part of the public debt of the former Austro-Hungarian Monarchy.

§ 68. SUCCESSION TO CONTRACTS (DEBT): CASE OF UNSUCCESSFUL REVOLT

The paper printed below is an opinion given by Sir Robert Phillimore, a Law Officer of the Crown, at the request of Lord Stanley. It deals with the question of the liability of the United States for loans made to the Confederate States. The footnotes are Professor Smith's, although some are omitted.

Professor Smith adds: "The principle expressed in this opinion was accepted by the Mixed Commission established under Articles XII-XVII of the Treaty of Washington (1871) to adjudicate upon British-American claims. The Commission held that the United States could not be held internationally liable for the debts of the Confederate government or for the acts of its military forces." *Great Britain and the Law of Nations*, I, 416, citing Moore, *International Arbitrations*, I, 684, 695; II, 2900.

**Opinion of Sir Robert Phillimore, Law Officer of the Crown,
February 13, 1867**

H. A. Smith, *Great Britain and the Law of Nations*, I, 412-416.
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I am honored with Your Lordship's commands, signified in Mr. Hammond's Letter of the 9th Instant stating that he was directed to transmit to

me a Letter from Messrs. Jewell and Chamberlain forwarding a memorial from the holders of the Confederate Cotton Loan together with a legal opinion which they have obtained on the subject of their claims; and to request that I would take these papers into consideration and furnish Your Lordship with my opinion thereupon:—

In obedience to Your Lordship's commands I have taken this case into consideration and have the honor to *Report*

That the positions for which the Petitioners contend appear to be these.—

(1) That the late Confederate States have been recognized as *de facto* belligerent by Her Majesty's Government and by the Tribunals of the United States, and are to be considered exactly in the same light as a Foreign Enemy whose Territory has been conquered and passes *cum onere* to the conqueror, that is with the obligation to discharge its debts contracted with the other Foreign States, binding upon him.—

(2) That the debts in this case were contracted on behalf of separate States which had independently of their temporary Union under a Confederacy, by their prior original political constitution as acknowledged by the United States power to contract such debts, and that the Confederate Government was only the Agent of each or all of these States separately competent to contract *per se* the Loan.—

(3) That these States have been prevented from discharging their debts by the Conqueror, the United States, and have been forced to repudiate them.—

(4) That the United States has possessed itself as Conqueror of all the resources of the States available for the discharge of the debt and even of the Cotton which was especially pledged for the repayment of the Foreign Creditor.

Upon these grounds principally, if not exclusively, the Memorialists apply to Her Majesty's Government to intervene on their behalf with the Government of the United States and obtain from them payment of the bonds issued by the late *de facto* Confederate Government.—

The Memorial raises two distinct questions (1)—Whether the United States are bound by the principles, rules and precedents of International Law to pay to the Foreign Creditor debts owing to him from the Confederate Government?—

(2) Whether, whatever may be the true answer to this question, the case of the Memorialists is made out for the official intervention of Her Majesty's Government on their behalf with the Government of the United States.

The second question alone calls for any remarks from me—I am of opinion, that Her Majesty's Government ought not to accede to the request of the Memorialists. It might be enough to say that Her Majesty's Govern-

ment could not do so without to a certain extent pronouncing judgement upon the difficult question of Foreign Constitutional Law with respect to the limits of the Sovereignty of each State and their relation to the Supreme Government of the United States which in great measure gave rise to this very war.—

The Memorialists take their stand upon the language of the Confederate Constitution previous to the war of the United States (Page 5 in fine, 6) with respect to the Sovereignty of each State composing the Union, and protest 'against the charge that the Bonds which we hold were issued by insurgents or by a Government having its origin in insurrection.'

Her Majesty's Government must therefore necessarily assume as the basis of their right to intervene that the very proposition of American Constitutional Law as to which this fierce controversy has arisen, and which has practically been solved by force and conquest after a bloody civil war, is nevertheless incontrovertible in the sense contended for by the Confederates and their Creditors.—

In other words Her Majesty's Government must found their application to the United States Government on the ground that the War which they have waged, and in which they have conquered, was unlawful, and contrary to the principles and laws of their own internal constitution.—

It is obvious that it is not competent to Her Majesty's Government to take this course;—The United States Government would be entitled to treat it in the same spirit as Her Majesty's Government would have treated the intervention of the United States Government, on behalf of a subject, who had lent to a native Indian Prince, during the late rebellion in India, to enable him to levy war against the Queen of England. The United States Government might by a like process of reasoning contend that the original contract subsisting between the East India Company and the native Prince had been broken, that he being an independent Sovereign had a right to borrow money of a Foreign Creditor, and that the Conqueror took his territory *cum onere* and was bound to discharge the debt.—

The argument from the recognition of the Confederates as *de facto* belligerents fails altogether as an argument for the interference of Her Majesty's Government.—

Her Majesty proclaimed a strict neutrality and enjoined it upon her subjects, admonishing them that if they aided either belligerent they would do so at their own peril—and without any claim upon her assistance, if evil consequences ensued to them therefrom.—

To furnish a belligerent with money is to render him the most material aid, to supply him with the very sinews of war.—Let me moreover suggest some tests by which both the duty of the neutral Government towards its subjects, and the *jus victoris*, may be tried.—

If the money, *in specie*, advanced by the Memorialists to the Southerners had been captured on its way out to them?—If the United States Army had seized the money *in specie* in the Treasury of the Confederates? If instead of money munitions of war, ships, cannons, and the like had been furnished by the Memorialists, and the United States Army had seized these articles for which Cotton Bonds had been given as a security, and afterwards the very Cotton itself which was pledged for their payment? In any or all of these instances the unfitness of any intervention on the part of Her Majesty's Government would be apparent:—but it would not be easy to distinguish, in principle, the right of Her Majesty's Government to demand, on behalf of the Memorialists, from the United States repayment of the money, which had actually reached the hands of the Confederate Government, and been expended by them; from the right to do so, when the money had been captured on the high seas, or on land, or when the loan had been contracted by an exchange—immediate or promised of commodities (e.g.—So much munitions of war for so much Cotton) and these commodities had been seized *jure belli* by the Conqueror.¹

I do not think that Her Majesty's Government is bound to consider the remaining question—namely, as to the obligation of the United States, towards the private British Creditor of the late Confederacy; if my opinion be well founded, that this creditor has no claim to the official intervention of Her Majesty's Government on his behalf.

But I will offer upon this part of the case also a few observations.—The United States' Government may not unfairly contend that the general obligation of the conquering State to discharge the debts, previously contracted with foreign creditors, by the conquered State, does not extend to the case, where these debts have not been the subject of an engagement previous to the war, but have been contracted during, and for the express purpose of carrying on, the war:—inasmuch as this doctrine would compel the Conqueror to defray the cost not only of his own conquest, but of the resistance of his enemy.—

But that at all events it cannot be said to apply to the case of a debt contracted by Provinces or States, which, before the war, were subject to the authority of the Power from which they revolted and by which they have been, after a short struggle by force of arms, recovered.—

This war (the United States Government may observe) was not closed by a Treaty which contained stipulations that the Conqueror should, either altogether, or in a specified proportion, pay the debts of the conquered, according to the usage which has long prevailed on this subject.—No Foreign State intervened in the war, or made any demand at the close of it,

¹ The reasoning of these paragraphs is an interesting anticipation of the decisions taken in the Great War to treat all forms of money as absolute contraband. [Note by H. A. Smith.]

that a Foreign debt should be recognised by the Conqueror.—The Creditors, in this case, entered of their own free-will into a speculation which, if the Confederates had prospered, would have been lucrative, but which their failure has rendered the reverse.

Whether they have any right to complain that their debtors, the States of the late Confederacy, yielded without making terms, on their behalf, with the Conqueror; or that they accepted the repudiation of the debt as a condition of their being restored to the union, or that they do not now contrive some means of fulfilling their engagements with their creditors, are questions which the Government of the United States may well refuse to entertain.—

The importance of the subject has led me to report at greater length than I could have wished, but, for the reasons which I have stated, I am clearly of opinion that Her Majesty's Government ought not to comply with the prayer of the Memorial from the holders of the Confederate Cotton Loan.²

§ 69. (3) SUCCESSION TO STATE CONTRACTS (INCLUDING CONTRACTS OF DEBT)—GERMANY AND THE AUSTRIAN DEBTS, 1938-1939

NOTE BY THE EDITOR

There is nothing in international practice to indicate that there is a rule of international law which requires an acquiring State to take over either the contractual obligations of a whole State (if a whole State is annexed) or that part of the contractual obligations of the State from which territory is acquired and which is attributable to the territory acquired. The matter is one entirely governed by treaty arrangement. Although there are cases in which the annexing State assumed a part of the general debt of the ceding State attributable to the territory ceded, as Prussia did in 1866 when Schleswig-Holstein was acquired from Denmark, there are also cases in which the annexing State refuses either to assume this part of the general debt of the ceding State or to allow the territory ceded to remain responsible for them independently, as was the case in 1898 when the United States refused to accept responsibility for debt incurred by Spain on the security of revenues of Cuba or to permit Cuba to accept such responsibility. A British-American Claims Commission of 1854 declined to entertain the claim of a British holder of bonds of Texas issued during the independence of Texas, since the claim was "for transactions with the independent Republic of Texas prior to its admission as a State of the United States."¹ Such state-

² F. O. 83/2225.

¹ Moore, *International Arbitrations*, IV, 3591.

ments of principle as may safely be made are negative in effect; e. g., that an annexing State is not bound to take over certain "odious" debts like those incurred for the purpose of carrying on hostilities against the annexing State. The most that can be said in the way of an affirmative principle is that there is a tendency in practice for the acquiring State to assume some degree of liability.² The provisions in the Treaty with Austria printed above may be said to illustrate this tendency.

Germany and the Austrian Debts, 1938-1939.—The absorption of Austria by Germany in March, 1938, precipitated a controversy over German succession to existing Austrian debts which is instructive as to the role that rules of international law play in this field. The United States contended that Germany was responsible for the payment of three classes of Austrian debt: (1) relief indebtedness of the Austrian Government to the American Government, originally incurred for the purchase of flour, and originally a first charge on all the assets and revenues of Austria; (2) the Austrian Government International Loan of 1930, held by private investors of many States, part of the bonds being a first charge on the Austrian Customs and Tobacco Monopoly; (3) dollar bonds of Austrian political subdivisions and corporations, held by private investors in many countries.

The United States claimed that Germany was legally responsible for the service of all these classes of the Austrian debt. To the German Government's contention "that having regard to former precedents of international law and to the principles applied therein, it was not under a legal obligation to take over the external debts of the Austrian Federal Government,"³ the American Government expressed emphatic dissent. It expressed the hope that Germany would undertake the payments "incumbent on it both under international law and under equity. It is believed that the weight of authority clearly supports the general doctrine of international law founded upon obvious principles of justice that in case of absorption of a state, the substituted sovereignty assumes the debts and obligations of the absorbed state, and takes the burdens with the benefits. A few exceptions to this general proposition have sometimes been asserted, but these exceptions appear to find no application to the circumstances of the instant case. Both the 1930 loans and the relief loans were made in time of peace, for constructive works and the relief of human suffering."⁴

Neither government receded formally from the legal positions thus taken. The German Government, however, took two practical steps to clear

² See Feilchenfeld, *Public Debts and State Succession* (1931), Chap. XXXI.

³ Oral statement of May 16, 1938, as reported in United States Department of State *Press Releases*, June 18, 1938, p. 695. Later it was added that the debts of the Austrian Government "were brought about in order to support the incompetent Austrian State artificially created by the Paris Treaties." Note of October 19, 1938; *Press Releases*, December 3, 1938, p. 376.

⁴ Note of June 9, 1938; *Press Releases*, June 18, 1938, p. 695.

up the situation: (1) the Finance Ministry offered to exchange the Austrian bonds for German bonds, but on terms very disadvantageous to the holders; (2) the Government entered into separate agreements with States other than the United States for payment on behalf of their bondholders. None of these arrangements applied to the intergovernmental relief indebtedness, which was excluded "because of its specific nature."⁵ These settlements, the German Government contended, were made possible in each case by the existence of an export balance in favor of Germany, which did not exist in the case of the United States, on account of the "passive" nature of German-American trade. To this invitation to link trade arrangements with the payment of what the United States regarded as a legal obligation, the American Government did not respond, except to protest the discrimination against American holders as compared with those of other nationalities.⁶ To this the German reply was that it was willing to negotiate if the United States would co-operate—"making possible an adjustment of the rates of the loan service to altered conditions—an adjustment with which all the other countries with which negotiations have been carried on have agreed."⁷ Moreover, the terms of exchange offered by the Finance Ministry were open without discrimination to American bondholders.

What emerges? (1) On the abstract legal obligation of Germany there was no agreement. (2) As to the intergovernmental relief debt, not even a *de facto* responsibility was accepted by Germany. (3) For the privately held debt, Germany assumed some *de facto* responsibility if it received concessions, either as to reduction in amount or in trade arrangements facilitating payment.⁸

§ 70. RESPONSIBILITY OF CONQUERING STATE FOR PRE-WAR WRONG (TORT) OF CONQUERED STATE

West Rand Central Gold Mining Co., Ltd., v. The King

GREAT BRITAIN, KING'S BENCH DIVISION, 1905

[1905] 2 K. B. 391.

See § 8, above.

⁵ Note of January 3, 1939; *Press Releases*, January 28, 1939, p. 53. The American Government saw "no reason why the intergovernmental relief debt should be left out of present consideration." Note of January 20, 1939; *Press Releases*, January 28, 1939, p. 54.

⁶ The American Government disclaimed the practice of conducting "adjustment negotiations with foreign debtors for American bondholders or other private creditors" and stated that it aimed to facilitate direct debtor-creditor adjustments. Note of October 19, 1938; *Press Releases*, Dec. 3, 1938, p. 379.

⁷ Note of January 3, 1939; *Press Releases*, January 28, 1939, p. 53.

⁸ For the correspondence, see *Press Releases* of April 9, June 18, December 3, 1938, and January 28, 1939. For a general discussion of German obligations as successors to Austria, see J. W. Garner, "Questions of State Succession Raised by the German Annexation of Austria," 32 *A.J.I.L.* (1938), 421. A speech of Herr Funk, Reich Minister of Economics, denying German responsibility is reported in *The New York Times*, June 17, 1938, and a learned reply thereto by J. W. Garner in 32 *A.J.I.L.* (1938), 766.

§ 71. (4) STATE WRONGS (TORTS)

NOTE BY THE EDITOR

There is nothing in international practice to indicate that there is a rule of international law requiring a State acquiring territory to accept responsibility for a delict or tort committed by a predecessor State. While there has been much criticism of the sweeping character of Lord Alverstone's remarks in *West Rand Central Gold Mining Co. v. The King* (§ 8), its doctrine has since been vindicated in international tribunals. In 1925, in the case of the claims of certain British subjects against the United States for wrongful imprisonment, detention, etc., by the Hawaiian Republic before its annexation to the United States, the Tribunal of Arbitration declared:

We think the cases are governed by the decision of this tribunal in the Case of Robert E. Brown, Nielsen's Report, p. 187. It is contended on behalf of Great Britain that the Brown case is to be distinguished because in that case the South African Republic had come to an end through conquest, while in these cases there was a voluntary cession by the Hawaiian Republic. . . . We are unable to accept the distinction contended for. In the first place, it assumes a general principle of succession for liability to delict, to which the case of succession of one state to another through conquest would be an exception. We think there is no such principle. It was denied in the Brown case and has never been contended for to any such extent. The general statements of writers, with respect to succession to obligations, have reference to changes of form of government, where the identity of the legal unit remains, to liability to observe treaties of the extinct state, to contractual liabilities, or at most to quasi-contractual liabilities. Even here, there is much controversy. The analogy of universal succession in private law, which is much relied on by those who argue for a large measure of succession to liability for obligations of the extinct state, even if admitted (and the aptness of the analogy is disputed), would make against succession to liability for delicts. Nor do we see any valid reason for distinguishing termination of a legal unit of international law through conquest from termination by any other mode of merging in, or swallowing up by, some other legal unit. In either case the legal unit which did the wrong no longer exists, and legal liability for the wrong has been extinguished with it.¹

The claims were rejected.

§ 72. PERSISTENCE OF LOCAL LAW AND PRIVATE RIGHTS

Under Article 256 of the Treaty of Versailles, the "Powers to which German territory is ceded shall acquire all property and possessions situated therein belonging to the German Empire or to the German States. . . ." Under the

¹ Nielsen's *Report*, American and British Claims Arbitration (1926), pp. 160, 161. See, generally, C. J. B. Hurst, "State Succession in Matters of Tort," 5 *B. Y. I. L.* (1924), 163.

Polish minorities treaty of the same date, Poland agreed that certain stipulations for the protection of minorities in Articles 2-8 should be regarded as "fundamental laws" with which no Polish law, regulation, or official act might interfere. Article 7 provided that "all Polish nationals shall be equal before the law and shall enjoy the same civil and political rights without distinction as to race, language, or religion," while Article 8 added that "Polish nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as the other Polish nationals." In Article 12 Poland agreed that "the stipulations in the foregoing Articles, so far as they affect persons belonging to racial, religious or linguistic minorities, constitute obligations of international concern and shall be placed under the guarantee of the League of Nations."

In 1920 Poland enacted a law the effect of which was to dispossess a number of former German colonists holding lands under contracts (*Rentengutsverträge*) granted by the Prussian Colonization Commission prior to the Armistice of November 11, 1918. In these cases *Auflassung*, the act of the government indicating final fulfillment of the contract and consequent transfer of title to the land, had not taken place, and Poland contended that *Auflassung* could be withheld. Moreover, Poland declined to recognize leases of Prussian State properties made by Prussia before the Armistice.

In 1923 the Council of the League of Nations requested of the World Court an Advisory Opinion on whether these acts of Poland involved international obligations contemplated by the Treaty of Versailles, and if they came within the competence of the League of Nations as defined by the Treaty; and, if so, whether "the position adopted by the Polish Government . . . is in conformity with its international obligations."

The resulting Advisory Opinion is probably the most authoritative statement we have as to the effect of a change of sovereignty upon acquired private rights to land, although the Court is careful to point out that it is dealing only "with private rights under specific provisions of law and of treaty."

Advisory Opinion, German Settlers in Poland

PERMANENT COURT OF INTERNATIONAL JUSTICE, 1923

Publications, Permanent Court of International Justice, Series B,
No. 6, pp. 29 ff.

III. [By the Court] . . .

The second question before the Court relates to certain measures taken by Poland affecting certain contracts entered into by the settlers with the Prussian Government. Before proceeding to answer this question it should be observed that German law is still in force in the territories ceded by Germany to Poland, and that reference to German law is necessary in the examination of the nature and extent of the rights and obligations arising under these contracts. The Court, however, will not discuss distinctions and exceptions which are not necessary for the present case.

As regards the *Rentengutsverträge* mentioned in point (a) of the question, they are both in form and in substance a special kind of contract of

sale. Specimens of such contracts are before the Court. The contract states that the holder acquires the land as owner; he is described throughout the instrument as a purchaser and he enters into possession of the land upon the conclusion of the contract and the payment of a fixed sum. The chief characteristics which distinguish these *Rentengutsverträge* from ordinary contracts of sale are:

(1) Part of the purchase price is paid before taking possession of the land and the remainder is to be paid thereafter in the form of a fixed rent, which may be redeemed on conditions stated in the contract; and

(2) under the special and general conditions (*Bedingungen*), which form part of the contract, certain obligations are imposed upon the purchaser and certain rights are reserved to the Prussian State, including in certain specified cases the right of withdrawal and the right of re-purchase. But except as otherwise provided in these special and general conditions, the ordinary rules governing contracts of sale apply to the *Rentengutsverträge*.

Under German law the transfer of ownership of land is subject to specific provisions. A contract of sale, for instance, even followed by entry into possession on the part of the purchaser, is not sufficient in itself to vest the legal ownership (*Eigentum*) in the purchaser. To effect a transfer of such ownership, *Auflassung* and entry in the land registry are necessary. The *Auflassung* consists in declarations of transfer of ownership made at the same time by both parties before the land Registry Office (Articles 873 and 925 of the German Civil Code). It follows that holders under *Rentengutsverträge* where there was no *Auflassung* before November 11th, 1918—had not acquired legal ownership of the lands prior to such date. But it by no means follows that they had not acquired a right to the land.

It has been contended that, before *Auflassung*, the rights of the holders, if any, are only inchoate or imperfect rights which are not enforceable at law. The Court is unable to share this view. . . .

It has been shown that under the *Rentengutsverträge* the purchaser has, even before *Auflassung*, vested rights enforceable as against the vendor. The principal question with which the Court is now confronted is the following: The sovereignty and the ownership of State property having changed, is the settler who had concluded a *Rentengutsvertrag* with the Prussian State entitled to claim from the Polish Government as the new owner the execution of the contract, including the completion of the transfer by *Auflassung*?

Three views have been suggested.

The first is that the contracts are of a "personal" nature and exist only as between the original parties, i. e. the Prussian State and the holder of the lands, so that the obligations of the former cannot be considered as having passed to Poland. The reasons why this hypothesis is not acceptable may be found both in what has been said as to the legal nature of the rights of the

holder under the *Rentengutsverträge* and in what is now to be said concerning the effect of a change of sovereignty on private rights.

Equally unacceptable is the second view, that the *Rentengutsverträge* have automatically fallen to the ground in consequence of the cession of territory. Private rights acquired under existing law do not cease on a change of sovereignty. No one denies that the German Civil Law, both substantive and adjective, has continued without interruption to operate in the territory in question. It can hardly be maintained that, although the law survives, private rights acquired under it have perished. Such a contention is based on no principle and would be contrary to an almost universal opinion and practice.

There remains the third view that private rights are to be respected by the new territorial sovereign.

The general question whether and under what circumstances a State may modify or cancel private rights by its sovereign legislative power, requires no consideration here.

The Court is here dealing with private rights under specific provisions of law and of treaty, and it suffices for the purposes of the present opinion to say that even those who contest the existence in international law of a general principle of State succession do not go so far as to maintain that private rights including those acquired from the State as the owner of the property are invalid as against a successor in sovereignty.

By the Minorities Treaty Poland has agreed that all Polish nationals shall enjoy the same civil and political rights and the same treatment and security in law as well as in fact. The action taken by the Polish authorities under the Law of July 14th, 1920, and particularly under Article 5 is undoubtedly a virtual annulment of the rights which the settlers acquired under their contracts and therefore an infraction of the obligation concerning their civil rights. It is contrary to the principle of equality in that it subjects the settlers to a discriminating and injurious treatment to which other citizens holding contracts of sale or lease are not subject.

It remains now for the Court to consider whether the protection assured by the Minorities Treaty in respect of civil rights is affected by any of the provisions of the Peace Treaty, or whether the continuous validity of the contracts is impaired by any of the contract clauses.

Poland has invoked Article 91, paragraph 2 of the Peace Treaty, which provides that German nationals or their descendants who became residents of the ceded territories after January 1st, 1908, will not acquire Polish nationality without a special authorisation from the Polish State. Poland has further invoked Article 255, paragraph 2, of the same Treaty, which provides that Poland, in taking over a portion of the debts of the German Empire and the Prussian State, shall not be required to assume that portion

of the debt which, in the opinion of the Reparation Commission, is attributable to the measures taken by the German and Prussian Governments for the German colonisation of Poland. Poland contends that these stipulations indicate a purpose of de-Germanisation, and that consequently she should not be required to perform any of the obligations or to recognise any of the rights resulting from contracts into which the former sovereign, in carrying out his policy of Germanisation, entered with reference to the property which passed to the Polish State under Article 256 of the Treaty.

The stipulations in question are specific, and respectively relate only to a limited phase of the acquisition of nationality, and to the apportionment of public debts. They have no bearing upon the preservation of private rights; and an extension of them to that subject not only would be inconsistent with the provisions of the Minorities Treaty concluded the same day, but would also be inconsistent with other provisions of the Peace Treaty directly bearing on private rights.

Furthermore, Poland claims that she acquired the property of the German States unburdened, because the Peace Treaty does not in terms require her to fulfil the obligations which those States had contracted with regard to such property. The Court, as has already been seen, is of opinion that no treaty provision is required for the preservation of the rights and obligations now in question. In the opinion of the Court, therefore, no conclusion can be drawn from the silence of the Treaty of Peace contrary to that resulting from the preceding statements. On the other hand, however, the position of the Court as regards the protection of the private rights now in question appears to be supported by the provisions of that Treaty.

It is true that the Treaty of Peace does not in terms formally announce the principle that, in the case of a change of sovereignty, private rights are to be respected; but this principle is clearly recognised by the Treaty. . . .

Certain other considerations relating to the conditions contained in the *Rentengutsverträge* have been invoked in order to justify the annulment of these contracts.

First, the attention of the Court has been drawn to their mixed private and public character. But the political motive originally connected with the *Rentengutsverträge* does not in any way deprive them of their character as contracts under civil law, and the few clauses which they contain of a distinctively political character become inoperative without interfering in the least with the normal execution of their essential clauses.

Secondly, no argument for the annulment of the contracts can be based upon the depreciation which has taken place since their conclusion in the value of the currency in which the stipulated rent is payable. The Court is not called upon to consider whether or how the disproportion between the value of the estate and the depreciation of the rent can be legally overcome.

A similar disproportion has taken place in numerous other cases more or less similar, and it would be incompatible with the principle of equality to treat such disproportion as invalidating the contract only in the case of the *Rentengutsverträge*.

It remains to consider whether an *Auflassung* made after November 11th, 1918, was in violation of Clause XIX of the Armistice Conditions and Clause 1 of the Final Protocol signed at Spa, December 1st, 1918. Even assuming that from any point of view the date of the Armistice, November 11th, 1918, was the decisive date for determining the validity of the contracts under consideration, it may be observed that an *Auflassung*, which is but the fulfilment of a contract of alienation already entered into by the Prussian State, cannot be considered as a "removal" (*distraktion*) of public securities within the meaning of the Armistice, nor as a "diminution" of the value of the public or private domain within the meaning of the Spa Protocol. The settlers were already in legal possession of the lands in which they had invested their money, and to which they had already acquired rights enforceable at law; and the Prussian State was not forbidden to perform the usual administrative acts under its pre-existing contracts with private individuals, especially where the delay in the performance of such acts had been due to the disturbed conditions arising from the war. . . .

For these reasons,

The Court is of opinion,

That the points referred to in (a) and (b) of the Resolution of the Council of the League of Nations of February 3rd, 1923, do involve international obligations of the kind contemplated by the Treaty between the United States of America, the British Empire, France, Italy, Japan and Poland, signed at Versailles on June 28th, 1919, and that these points come within the competence of the League of Nations as defined in that Treaty;

That the position adopted by the Polish Government, and referred to in (a) and (b) of the said Resolution was not in conformity with its international obligations. . . .

§ 73. PERSISTENCE OF LOCAL LAW, LOCAL PUBLIC RIGHTS, AND PRIVATE RIGHTS

NOTE BY THE EDITOR

"It is true," said the World Court in its Sixth Advisory Opinion (§ 72), "that the Treaty of Peace does not in terms formally announce the principle that, in the case of a change of sovereignty, private rights are to be respected; but this principle is clearly recognised by the Treaty." In this Advisory Opinion the Court made one application of a principle now generally ac-

cepted, and which was well stated by the United States Supreme Court in 1911, in denying that the cession of the Philippine Islands to the United States had so destroyed the juristic personality of the city of Manila that it was no longer liable for debts contracted prior to cession:

It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions and constitution of the new government are at once displaced. Thus . . . the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use, and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are of a strictly municipal character, the rule is general, that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed.¹

Feilchenfeld found that the peace treaties after the wars 1914-1919 recognized "the rule of maintenance" with respect to the debts of local public bodies, and that the Reparation Commission "recognized expressly that war debts were not excluded from the legal protection which the treaties grant to local debts."²

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¹ *Vilas v. City of Manila* (1911), 220 U. S. 345 at 357, quoting *C.R.I.* and *P. Ry. v. McGlinn*, 114 U. S. 542, 546 (1885).

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QUESTIONS AND PROBLEMS

Students are urged to read all the materials in the chapter before attempting to work out the questions and problems.

1. What were the facts in the case of the *Sapphire* (§ 64)? What were the precise legal questions before the Court? How did the Court answer these questions?

Could Napoleon III sue in the courts of the United States? What was the English law on such a point? Did the American Constitution make provision for such a case as this? Could Napoleon have sued under American law as a private individual? Was he suing as a private individual in this case? Of what importance is this point?

Was the decision of the Court really in favor of Napoleon III? What was his status when the Court decided the case? To whom should the *Sapphire* be restored, judging from the part of the case printed here? Of what significance is this? When Nicholas II of Russia abdicated, could the Provisional Government of Kerensky, recognized by the United States, maintain his rights in American courts? (Compare §§ 28, 29.) Could the Soviet Government of Russia do the same when it succeeded the Provisional Government? Explain. Could *Reichsführer* Hitler sue in American courts today relative to claims of the German Government in the United States under Wilhelm II?

Could Hitler be sued in American courts? Could Haile Selassie, as Emperor of Ethiopia? George VI? (See §§ 28, 29.) What are the reasons for this?

In international law, does the identity of the State change when its form of government changes? When the King dies? When a Democratic President succeeds a Republican President? When a Labor Prime Minister succeeds a Conservative Prime Minister? When the Reichstag becomes the creature of the Chancellor? When the Army overthrows the Government and a group of generals rules? Is the State of Italy the same today in international law as it was twenty-five years ago? The State of Russia? The State of China? Explain.

Of what importance is this principle to international law?

2. What were the facts before the Court in *Terlinden v. Ames* (§ 65)? What was the precise legal question before the Court? How did the Court answer this question?

Was the question answered by resort to general international law, or to treaties, or both? Explain. Who were the parties to the treaty of 1852? Did this have any importance in connection with the nationality of Terlinden? Did Terlinden claim that this treaty was still in force in 1902? What change took place in the status of Prussia in 1866? Did the Court think this change terminated the treaty of 1852? Explain the Court's reasoning. If Prussia had been absorbed by Austria in 1866, would the Court's reasoning have been the same? What was the attitude of the American Government towards the change in 1860, and what was its significance for the Court? Suppose Terlinden had been a citizen of Bremen, and his case had arisen in 1867; what do you think the Court would have decided? Who were the parties to the treaty of 1868? What change did this make in the situation? Would this treaty make the case of the citizen of Bremen any clearer?

What change took place with the adoption of the Constitution of the Ger-

man Empire in 1871? What claim did Terlinden make with respect to this? What was the reasoning of the Court? Did the Government of the United States regard the treaty as terminated? What showed its attitude? What was the attitude of the German Government and how was it shown? Did this attitude require that the treaty between the United States and Bavaria should lapse as a result of the formation of the Empire? Can you reconcile your answer to the answer given above as to whether Prussian-American treaties would terminate if Prussia had been absorbed by Austria in 1866?

Was Terlinden's argument based fundamentally on the change in 1866 or on that in 1871? Why did the Court treat the whole history?

Do you think the Court reasoned independently, or that it relied mainly on the attitude of other departments of the American Government? Does this make its conclusions more or less valuable as evidence of international law?

Could Terlinden have been extradited if there had been no treaty? (See on this point Chapter XI, especially § 101.)

3. What is the general problem dealt with in Articles 203-204 of the *Treaty of Peace with Austria* (§ 67)? Is a debt in any way analogous to a treaty as an international obligation? Explain the resemblances and the differences. Why were the provisions of Articles 203-204 necessary? Who was protected by these provisions?

What is the difference which appears in the Treaty between secured and unsecured debts? Explain whether you think these methods were fair, granting that the Austro-Hungarian Monarchy was to be dismembered.

What is the special problem dealt with by Article 204? What disposition does the Treaty prescribe for these debts? Is there any hint that such debts should be canceled?

What date is chosen for ascertaining the amount of the Austrian Government's debt? Why do you suppose this date was chosen? What provision is made in these articles for the Austrian Government debt incurred after this date? Can you explain this situation?

4. The following is Section 4 of the Fourteenth Amendment to the Constitution of the United States, proclaimed July 28, 1868:

"The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void."

Comment on this section. Can you explain the principle it embodies? Can you suggest reasons for this principle? Does this principle conflict with the principles embodied in the Articles from the Treaty of Peace with Austria? Can they be reconciled?

The following is the first Section of Article 6 of the Constitution of the United States:

"All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the Confederation."

Does this statement illustrate any principle already discussed? How does it

compare with Section 4 of the Fourteenth Amendment as stated above? Can you explain any difference?

5. What is the nature of the *Opinion* of Sir Robert Phillimore, reprinted as § 68? Is it international law? What weight would it have before a tribunal of arbitration?

What are the circumstances in which the *Opinion* was requested? What questions of international law are asked? How are they answered?

What did Sir Robert mean by the words "Her Majesty's Government must found their application to the United States Government on the ground that the War which they have waged, and in which they have conquered, was unlawful, and contrary to the principles and laws of their own constitution"? Do you think this position is correct?

How did Sir Robert dispose of the argument that the British recognition of the Confederacy as belligerents justified British interposition on behalf of the Memorialists?

Does any obligation rest on a conquering State to pay the debts of revolting provinces incurred for purposes of the revolt?

6. What were the facts in the case of *West Rand Central Gold Mining Co. v. The King* (§ 8)? What were the precise legal issues before the Court? How did the Court decide these issues?

Was the Government that seized the gold a *de facto* or a *de jure* government? Did the seizure take place during the war? Do you think this fact is of any significance? Who was now responsible for making good the seizure, according to the argument of the Company? How, judging from the discussion of the Court, did the Company support this argument?

Was it clear to the Court that the Government of the South African Republic had incurred any contractual obligation towards the Company? In reading the judgment, does it seem to you that much of it relates to the contractual obligations of the conquered State? How do you account for this? What is the logical relation of the discussion of the Court to the questions before it?

Is a conquering State liable by international law for the obligations of a conquered State? Would it make any difference if there were a treaty covering the point between the conquering State and the conquered State at the conclusion of the war? Would it be contrary to international law for the conquering State to refuse to accept such responsibility in such a treaty? For the conquering State to assume such responsibility in full? Was there any such treaty in this case? What does the Court think of the value of text-writers as evidence, and how does it estimate the nature of their texts? Why did the Court think that Lord Robert Cecil had "ultimately to concede that he must contend that the obligation was absolute to take over all debts and contractual obligations incurred before war had been actually declared. . . .?"

Does the Court have anything to say about the private property of individuals in conquered territory? (Compare § 73.) About claims of the conquering State to goods in territory of a third State under contract of the conquered State? Did the Court think these matters had any bearing on the facts before it?

What do you think of the judgment of the Court, taken as a whole?

7. What were the circumstances leading to the *Advisory Opinion* (§ 72) relating to the rights of German settlers in Poland? Who requested this *Opinion*? What Court handed down this *Opinion*? What effect has such an *Opinion*?

Is it binding on Poland and Germany? On the Council of the League of Nations? How would you rank such an Opinion as evidence of international law?

Upon what questions was the Court asked to express its opinion? What treaty provisions were involved? What laws? How did the Court answer the questions put to it? Did it do so by relying only on treaty provisions, or upon general principles of international law, or both? Explain.

What law was in force in the territories ceded by Germany to Poland? What effect did this have on the case? What were *Rentengutsverträge*? What was *Auflassung*? What is an "inchoate" right or title? What was the status of the rights involved in the Polish laws? Did the settlers have full title to their lands before the Armistice?

What three views had been advanced as to the effect of a change of sovereignty on private rights? What was the Court's attitude towards each of them? Do all private rights terminate on a change of sovereignty? Do all private rights persist in case of a change in sovereignty? In what way is the Court concerned with these general questions?

What did Poland allege was the effect of the Peace Treaty upon the case? What was the Court's attitude towards this claim?

State as clearly as you can what private rights survive a change in sovereignty and what rights do not.

8. At the conclusion of a war between States X and Y, State X annexes Province A of State Y. The treaty of peace states that all questions of state succession are to be determined according to the principles of international law. What disposition would be made of the following questions by a tribunal of arbitration?

- (a) Public debt of Province A, including the following items:
 - Debt incurred for schools
 - "Liberty Loan" raised by Province A and contributed to State Y to carry on the war against State X
 - Social insurance loan
 - Bond issue to pay pensions to war veterans
- (b) Debts of municipalities in Province A
- (c) Public debt of State Y
 - Debt incurred for highways
 - General unsecured debt
 - Consolidated war debt (including existing obligations of State Y for all wars in which it has engaged)
- (d) Contracts
 - Unpaid balance due from Province A to a manufacturer of asphyxiating gases
 - Twenty-year contracts of sale with Government of State Y for lands in Province A, on which only one 5 per cent payment has been made. A large number of such contracts were made by State Y for the purpose of filling up the area with Y nationals before the signature of the peace treaty.
 - Contract with State Y to carry the mails in a rural district of Province A
 - Contract with Province A to erect a building for the provincial university

- (e) Grant made by Province A in 1670, and continuously observed, vesting the office of Chief of Police in heirs of Baron Münchhausen forever
- (f) Debt owed by a grocery store in Province A to a wholesaler in Province A
- (g) A hundred-year lease of a business block in the capital of Province A
- (h) Claim against armed forces of State Y for illegal seizure of property made before the war

VIII

State Responsibility

§ 74. RESPONSIBILITY OF STATES FOR DAMAGE DONE IN THEIR TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS

This document is not a binding convention on the subject, but a proposal for a codification of international law. It serves, however, as a general introduction to the subject matter of this chapter, important phases of which are treated in more detail in the following sections.

Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners

DRAFT CONVENTION, HARVARD LAW SCHOOL RESEARCH IN INTERNATIONAL
LAW, 1929¹

23 *American Journal of International Law* (Supp., April, 1929),
133-135.

ARTICLE I. A state is responsible, as the term is used in this convention, when it has a duty to make reparation to another state for the injury sustained by the latter state as a consequence of an injury to its national.²

¹ The Reporter responsible for this Draft was Edwin M. Borchard. Advisers were Philip Marshall Brown, Charles K. Burdick, William C. Dennis, Clyde Eagleton, Manley O. Hudson, Charles E. Hughes, Charles Cheney Hyde, Ellery C. Stowell, George W. Wickersham, and Quincy Wright.

² The following Articles were adopted by the Responsibility Committee of the 1930 Hague Conference on the Codification of International Law, but were not reported to the Conference: "Art. 1. International responsibility is incurred by a State if there is any failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner on the territory of the State. Art. 2. The expression 'international obligations' in the present Convention means obligations resulting from treaty, custom or the general principles of law which are designed to assure to foreigners in respect of their persons and property a treatment in conformity with the rules accepted by the community of nations. Art. 3. The international responsibility of a State imports the duty to make reparation for the damage sustained in so far as it results from failure to comply with its international obligation."—Ed.

ARTICLE 2. The responsibility of a state is determined by international law or treaty, anything in its national law, in the decisions of its national courts or in its agreements with aliens, to the contrary notwithstanding.³

ARTICLE 3. A state is not relieved of responsibility because an injury to an alien is attributable to one of its political subdivisions, regardless of the extent to which the national government, according to its constitution, has control of the subdivision. For the purposes of this article, a dominion, a colony, a dependency, a protectorate, or a community under mandate, which does not independently conduct its foreign relations, is to be assimilated to a political subdivision.

ARTICLE 4. A state has a duty to maintain governmental organization adequate, under normal conditions, for the performance of its obligations under international law and treaties. In the event of emergencies temporarily disarranging its governmental organization, a state has a duty to use the means at its disposal for the performance of these obligations.

ARTICLE 5. A state has a duty to afford to an alien means of redress for injuries which are not less adequate than the means of redress afforded to its nationals.

ARTICLE 6. A state is not ordinarily responsible (under a duty to make reparation to another state) until the local remedies available to the injured alien have been exhausted.⁴

ARTICLE 7. (a) A state is responsible if an injury to an alien results from the wrongful act or omission of one of its higher authorities within the scope of the office or function of such authority, if the local remedies have been exhausted without adequate redress.

(b) A state is responsible if an injury to an alien results from the wrongful act or omission of one of its subordinate officers or employees within the scope of his office or function, if justice is denied to the injured alien, or if, without having given adequate redress to the injured alien, the state has failed to discipline the officer or employee.⁵

³ The following Article was adopted by the Responsibility Committee of the 1930 Hague Conference on the Codification of International Law, but was not reported to the Conference: "Art. 5. A State cannot avoid international responsibility by invoking the state of its municipal law."—Ed.

⁴ The following Article was adopted unanimously by the Responsibility Committee of the 1930 Hague Conference on the Codification of International Law, but was not reported to the Conference: "Art. 4. 1. The State's responsibility may not be invoked as regards reparation for damage caused by a foreigner until after exhaustion of the remedies available to injured persons under the municipal law of the State. 2. This rule does not apply in the cases mentioned in paragraph 2 of Article 9 [denial of justice]."—Ed.

⁵ The following Articles were adopted in the Responsibility Committee of the 1930 Hague Conference on the Codification of International Law, but were not reported to the Conference: "Art. 6. International responsibility is incurred by a State if damage is sustained by a foreigner as a result either of the enactment of legislation incompatible with its international obligations or of the non-enactment of legislation necessary for carrying out these obligations. Art. 7. International responsibility is incurred by a State if damage is sustained by a foreigner as a result of an act or omission on the part of the executive power incom-

ARTICLE 8. (a) A state is responsible if an injury to an alien results from its nonperformance of a contractual obligation which it owes to the alien, if local remedies have been exhausted without adequate redress.

(b) A state is not responsible if an injury to an alien results from the nonperformance of a contractual obligation which its political subdivision owes to an alien, apart from responsibility because of a denial of justice.

ARTICLE 9. A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.⁶

ARTICLE 10. A state is responsible if an injury to an alien results from its failure to exercise due diligence to prevent the injury, if local remedies have been exhausted without adequate redress for such failure. The diligence required may vary with the private or public character of the alien and the circumstances of the case.

ARTICLE 11. A state is responsible if an injury to an alien results from an act of an individual or from mob violence, if the state has failed to exercise due diligence to prevent such injury and if local remedies have been exhausted without adequate redress for such failure, or if there has been a denial of justice.⁷

patible with the international obligations of the State. Art. 8. 1. International responsibility is incurred by a State if damage is sustained by a foreigner as a result of acts or omissions of its officials, acting within the limits of their authority, when such acts or omissions contravene the international obligations of the State. 2. International responsibility is likewise incurred by a State if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed under cover of their official character if the acts contravene the international obligations of the State. International responsibility, however, is not incurred by a State if the official's lack of authority was so apparent that the foreigner should have been aware of it and could in consequence have avoided the damage."—Ed.

⁶ The following Article was unanimously adopted (though with several delegations abstaining) by the Responsibility Committee of the 1930 Hague Conference on the Codification of International Law, but was not reported to the Conference: "Art. 9. International responsibility is incurred by a State if damage is sustained by a foreigner as a result of the fact: 1) that a judicial decision, which is not subject to appeal, is clearly incompatible with the international obligations of the State; 2) that, in a manner incompatible with the said obligations, the foreigner has been hindered by the judicial authorities in the exercise of his right to pursue judicial remedies or has encountered in the proceedings unjustifiable obstacles or delays implying a refusal to do justice. The claim against the State must be lodged not later than two years after the judicial decision has been given, unless it is proved that special reasons exist which justify extension of this period."—Ed.

⁷ The following Article was adopted in the Responsibility Committee of the 1930 Hague Conference on the Codification of International Law by the small majority of 21 States to 17, but was not reported to the Conference: "Art. 10. As regards damage caused to the person or property of foreigners by a private person, the State is only responsible if the damage sus-

ARTICLE 12. A state is responsible if an injury to an alien results from an act of insurgents, if the state has failed to use due diligence to prevent the injury and if local remedies have been exhausted without adequate redress for such failure.

ARTICLE 13. (a) In the event of an unsuccessful revolution, a state is not responsible when an injury to an alien results from an act of the revolutionists committed after their recognition as belligerents either by itself or by the state of which the alien is a national.

(b) In the event of a successful revolution, the state whose government is established thereby is responsible under Article 7, if an injury to an alien has resulted from a wrongful act or omission of the revolutionists committed at any time after the inception of the revolution.

ARTICLE 14. A state is responsible if an injury to an alien results from an act, committed within its territory, which is attributable to another state, only if it has failed to use due diligence to prevent such injury.

ARTICLE 15. (a) A state is responsible to another state which claims in behalf of one of its nationals only insofar as a beneficial interest in the claim has been continuously in one of its nationals down to the time of the presentation of the claim.

(b) A state is responsible to another state which claims in behalf of one who is not its national only if

- (1) the beneficiary has lost its nationality by operation of law, or
- (2) the interest in the claim has passed from a national to the beneficiary by operation of law.

ARTICLE 16. (a) A state is not responsible if the person injured or the person on behalf of whom the claim is made was or is its own national.

(b) A state is not relieved of responsibility if injury is sustained by a foreign corporation, or if a claim is made on behalf of a foreign corporation, because one or more of the shareholders of such corporation possessed or possesses its nationality.

(c) A state is not relieved of responsibility as a consequence of any provision in its own law that an alien should be considered its national for a particular purpose.

ARTICLE 17. A state is not relieved of responsibility as a consequence of any provision in its own law or in an agreement with an alien which attempts to exclude responsibility by making the decisions of its own courts final; nor is it relieved of responsibility by any waiver by the alien of the protection of the state of which he is a national.

tained by the foreigner results from the fact that the State has failed to take the measures which may reasonably be expected of it in the circumstances in order to prevent, remedy, or inflict punishment for the damage." In general, large States and European States voted for this article, and small States and Latin-American States voted against it.—Ed.

ARTICLE 18. Any dispute between states parties to this convention, with respect to the interpretation or application of the provisions of this convention, which is not settled by negotiation and which is not referred to arbitration under a general or special arbitration treaty, shall be referred to the Permanent Court of International Justice, and may be brought before the Permanent Court of International Justice by either party to the dispute.

§ 75. SOME GENERAL PRINCIPLES OF STATE RESPONSIBILITY

NOTE BY THE EDITOR

The 1930 Hague Conference for the Codification of International Law had as one item on its agenda the codification of the law concerning the responsibility of States; but despite elaborate preparation (to which the Harvard Draft Convention printed above was one contribution) the Committee of the Conference was unable to complete its work or make any report to the whole Conference. This occurred despite a widespread belief that the law of responsibility of states was, because of the already large body of decided case-law in the field, particularly ripe for codification.¹

This branch of international law deals with situations in which the persons or property of the nationals of one State are located within the territory of another, and are adversely affected by acts occurring within the second State's jurisdiction. The element of nationality is of prime importance: the international case-law has been built up by international arbitrators who adjudge these claims as between *States*, which alone can have standing before an international tribunal; the way in which the alleged wrong suffered by an individual is transformed into a claim which can be put forward by the State on his behalf is through the tie of nationality which identifies him with that State. So true is this that international tribunals not only insist that the State demonstrate its nationality in the person on whose behalf it is claiming, but also ordinarily that this nationality shall have persisted from the time of the alleged wrong giving rise to the claim to the time when the States present the claim to the international tribunal established to deal with it.²

¹ See comments by Hackworth, Borchard, and Hudson in 24 *A.J.I.L.* (July, 1930). The body of international case-law is indeed immense, as is shown by a perusal of J. B. Moore, *International Arbitrations*, 6 vols. (1898); J. H. Ralston, *Law and Procedure of International Tribunals* (1926) with a *Supplement* (1936); C. Eagleton, *The Responsibility of States in International Law* (1928); text and citations in "The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners," by the Harvard Law School Research in International Law (23 *A.J.I.L.* [Supp., April, 1929]), 131-239; and A. H. Feller, *The Mexican Claims Commissions, 1923-1934* (1935).

² For an example, see the case of F. W. Flack, *British-Mexican Claims Commission under Convention of 1926, Decisions and Opinions of Commissioners*, 80, at 81.

Ways in which claims may arise.—Claims by one State on behalf of its nationals as against another State may arise in a number of ways. Thus the officials of State A might directly injure the persons or property of the nationals of State B, as when State A's legislature expropriates the property of nationals of State B; when the local police of State A participate in a mob instead of protecting the person of a national of State B; when soldiers of State A mistreat resident nationals of State B; or when access to the courts of State A is refused to a national of State B who claims to have been wronged. Again, State A may not live up to, or may repudiate, its contracts with nationals of State B, such as concessions or bond issues. Or the courts of State A may do injury to the nationals of State B through unreasonable delays, favoritism, denial of an opportunity to be heard through counsel, or a notoriously unjust sentence. Or the authorities of State A may be lax in their general duties of protection, with the result that the nationals of State B are subjected to mistreatment of their persons and property by private individuals, or by mobs, or by insurgents. We can not attempt here to list all the cases or to state legal principles; instead we can merely suggest the scope and range of the problems involved. The State offending in these ways has some degree of responsibility to the State whose nationals have been wronged, depending on a variety of circumstances. The Harvard Draft Convention reprinted above is an attempt to state the applicable rules. In the documents printed below, the *Chattin Case* (§ 76) which contains an interesting discussion of the difference between the direct responsibility of a State for the acts of its officers which do injury and the indirect responsibility which arises when its officers fail to afford reasonable protection to foreign nationals, is an important contribution to the concept of "denial of justice." The *North American Dredging Co. Case* (§ 77) discusses the responsibility of a State for fulfilling its contracts, in the light of the much-discussed "Calvo Clause." The *Case of the Serbian Loans* (§ 78) discusses the responsibility of a State for its contracts of debt, and the relative roles in this connection of municipal and international law. The materials of the *Bremen Incident* (§ 79) illustrate principles applicable to cases of mob violence.

General position of aliens.—In general, a State may refuse to admit aliens to its territory, or it may establish what conditions it pleases with respect to what aliens it will admit. In the *Chinese Exclusion Case*,³ the United States Supreme Court declared that the power to exclude aliens was an incident of sovereignty. Likewise, a State is free to expel aliens who under its legislation are undesirable. In *Ben Tillett's Case*, decided in an arbitration between Great Britain and Belgium under a convention

³ (1889) 130 U. S. 581.

of 1898, the Arbitrator declared that the right of a State to exclude from its territory foreigners when their dealings or presence appeared to compromise its security could not be contested, and that the State in the plenitude of its sovereignty judges the scope of the acts which lead to this prohibition.⁴ In the *Boffolo Case*, decided by the Italy-Venezuela Mixed Claims Commission under the Convention of 1903, Umpire Ralston declared, in making an award on behalf of an Italian expelled from Venezuela, that

1. A State possesses the general right of expulsion; but,
2. Expulsion should only be resorted to in extreme instances, and must be accomplished in the manner least injurious to the person affected.
3. The country exercising the power must, when occasion demands, state the reasons of such expulsion before an international tribunal, and, an inefficient reason or none being advanced, accepts the consequences. . . .⁵

A State may, of course, limit this power by making appropriate treaty arrangements, as when a State agrees to receive refugees of another nationality.⁶

Once an alien is admitted within the territory of a State he is generally subject to its jurisdiction, along with the nationals of the admitting State. The second paragraph of Article 9, *Montevideo Convention on the Rights and Duties of States*,⁷ "Nationals and foreigners are under the same protection of the law and the national authorities, and the foreigners may not claim rights other or more extensive than those of the nationals," states a principle which is controverted. Thus the United States-Mexico General Claims Commission (1926) declared: "The citizens of a nation may enjoy many rights which are withheld from aliens, and, conversely, under international law aliens may enjoy rights and remedies which the nation does not accord to its own citizens."⁸ Aliens may be placed under many disabilities under the local law: one example is their disability to hold land in certain jurisdictions. (See above, § 38.) But it is generally conceded that a State owes a duty of protection to resident aliens, and that in return the alien owes the protecting State a temporary allegiance. This is the basic philosophy of all the jurisprudence and attempted codifications of the law of State responsibility.

The rule that local remedies must be exhausted.—A corollary to the rule that a resident alien is in general subject to the local law is the general principle that the State where he is resident is not responsible for in-

⁴ 92 *British and Foreign State Papers*, 105.

⁵ Ralston, *Venezuelan Arbitrations of 1903*, 696, at 705.

⁶ See the *Convention concerning the International Status of Refugees*, opened for signature at Geneva October 28, 1933, reprinted in Hudson, *International Legislation*, VI, 483; and see text of the *Special Protocol concerning Statelessness*, above § 38.

⁷ U.S.T.S., No. 881.

⁸ *Opinions of the Commissioners*, 42, at 51.

juries done him to the State of which he is a national unless he has first exhausted whatever recourse is open to him under the law of the State where he resides or where his property is located. Both the Committee on Responsibility of the 1930 Hague Conference on the Codification of International Law and the Harvard Draft Convention recognize this principle (see § 74, Article 6), but there is much controversy over its applications. One example is printed below in the *North American Dredging Co. Case*, in relation to what is meant by exhaustion of local remedies where there is a "Calvo Clause" (§ 77 below). Arbitration tribunals have sometimes held that exhaustion of the local remedies was not necessary in cases where there was not ground for belief that a sufficient remedy was afforded by available judicial proceedings, as for example where local courts could not entertain suits against the State, *Ruden Case* (United States-Peru)⁹, or where judges were intimidated by a hostile mob, *Johnson Case* (United States-Peru).¹⁰

The Harvard Law School Research in International Law sets forth the reasons behind the rule stated in Article 6 of its Draft, as follows:

There are several reasons for this requirement that local remedies must first be exhausted, even when officials of the State have committed the injury, though in this respect there would appear to be little difference in result, whether an official or a private individual has injured the alien: first, the citizen going abroad is presumed and should ordinarily be required to take into account the means furnished by local law for the redress of wrongs; secondly, sovereignty and independence warrant the local state in demanding freedom from interference, on the assumption that its courts are capable of doing justice; thirdly, the government of the injured alien must recognize that the local government must have an opportunity of doing justice to the injured alien in its own regular way, and thus avoid, if possible, all occasion for international reclamation; fourthly, there is no opportunity to form even a preliminary judgment whether a wrong has been done, in ordinary cases, until the local remedies have been tried; fifthly, even if there has been a wrong, it is necessary to determine whether it is chargeable to the state itself, and whether the state is willing to leave the wrong unredressed. It is a sound principle that where there is a judicial remedy, it must be sought; only if it is sought in vain does diplomatic interposition become proper.¹¹

§ 76. DIRECT AND INDIRECT RESPONSIBILITY: DENIAL OF JUSTICE

In 1923 the United States and Mexico entered into a Convention establishing a General Claims Commission. The Commission was to consist of three

⁹ Moore, *Arbitrations*, 1653, at 1655.

¹⁰ *Ibid.*, p. 1656.

¹¹ "The Law of Responsibility, . . ." 23 *A.J.I.L. (Supp., April, 1929)*, 152-153.

members, and was to decide the matters submitted to it "in accordance with the principles of international law, justice, and equity." Under Article I of the Convention, the Commission was to decide claims of citizens of Mexico against the United States, and of citizens of the United States against Mexico, in the following categories: (1) "for losses or damages suffered by persons or by their properties," (2) "for losses or damages suffered by citizens of either country by reason of losses or damages suffered by any corporation. . . ." in which such citizens had an interest, (3) "for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice," and unsettled since an earlier Convention of 1868, (4) other claims filed by either Government within a specified time. (*United States Treaty Series*, No. 678.) A Special Claims Commission was established by another Convention of 1923, to settle claims "for losses or damages suffered by persons or by their properties during the revolutions and disturbed conditions which existed in Mexico, covering the period from November 20, 1910, to May 31, 1920, inclusive."—*United States Treaty Series*, No. 676.

Below is printed the Opinion of the Commissioners under the General Claims Convention, on the claim presented by the United States on behalf of Mr. B. E. Chattin, an American citizen. It contains interesting discussions of the meaning of "denial of justice," and of the direct and indirect responsibility of States for injuries done to foreigners.

United States (B. E. Chattin) v. United Mexican States

UNITED STATES-MEXICO, GENERAL CLAIMS COMMISSION, 1927

Opinions of Commissioners (1927), p. 422.

Van Vollenhoven, Presiding Commissioner. 1. This claim is made by the United States of America against the United Mexican States on behalf of B. E. Chattin, an American national. Chattin, who since 1908 was an employee (at first freight conductor, thereafter passenger conductor) of the Ferrocarril Sud Pacífico de México (Southern Pacific Railroad Company of Mexico) and who in the summer of 1910 performed his duties in the State of Sinaloa, was on July 9, 1910, arrested at Mazatlán, Sinaloa, on a charge of embezzlement; was tried there in January, 1911, convicted on February 6, 1911, and sentenced to two years' imprisonment; but was released from the jail at Mazatlán in May or June, 1911, as a consequence of disturbances caused by the Madero revolution. He then returned to the United States. It is alleged that the arrest, the trial and the sentence were illegal, that the treatment in jail was inhuman, and that Chattin was damaged to the extent of \$50,000.00, which amount Mexico should pay. . . .

3. The circumstances of Chattin's arrest, trial and sentence were as follows. In the year 1910 there had arisen a serious apprehension on the part of several railroad companies operating in Mexico as to whether the full proceeds of passenger fares were accounted for to these companies. The Southern Pacific Railroad Company of Mexico applied on June 15,

1910, to the Governor of the State of Sinaloa, in his capacity as chief of police of the State, co-operating with the federal police, in order to have investigations made of the existence and extent of said defrauding of their lines within the territory of his State. On or about July 8, 1910, one Cenobio Ramírez, a Mexican employee (brakeman) of the said railroad, was arrested at Mazatlán on a charge of fraudulent sale of railroad tickets of the said company, and in his appearance before the District Court in that town he accused the conductor Chattin—who since May 9, 1910, had charge of trains operating between Mazatlán and Acaponeta, Nayarit—as the principal in the crime with which he, Ramírez, was charged; whereupon Chattin also was arrested by the Mazatlán police, on July 9 (not 10), 1910. On August 3 (not 13), 1910, his case was consolidated not only with that of Ramírez, but also with that of three more American railway conductors (Haley, Englehart and Parrish) and of four more Mexicans. After many months of preparation and a trial at Mazatlán, during both of which Chattin, it is alleged, lacked proper information, legal assistance, assistance of an interpreter and confrontation with the witnesses, he was convicted on February 6, 1911, by the said District Court of Mazatlán as stated above. The case was carried on appeal to the Third Circuit Court at Mexico City, which court on July 3, 1911, affirmed the sentence. In the meantime (May or June, 1911) Chattin had been released by the population of Mazatlán which threw open the doors of the jail in the time elapsing between the departure of the representatives of the Diaz regime and the arrival of the Madero forces. . . .

5. It has been alleged, in the first place, that Chattin, contrary to the Mexican Constitution of 1857, was arrested merely on an oral order. The Court's decision rendered February 6, 1911, stated that the court record contained "the order dated July 9, which is the written order based on the reasons for the detention of 'Chattin'; and among the court proceedings there are to be found (a) a decree ordering Chattin's arrest, dated July 9, 1910, and (b) a decree for Chattin's "formal imprisonment," dated July 9, 1910, as well. Even if the first decree had been issued some hours after Chattin's arrest, for which there is no proof except the statement by the police prefect that Chattin was placed in a certain jail on the Judge's "oral order," the irregularity would have been inconsequential to Chattin. The Third Circuit Court at Mexico City, when called upon to examine the second decree given on July 9, 1910, held on October 27, 1910, that it had been regular but for the omission of the crime imputed (which was known to Chattin from the examination to which he was previously submitted on July 9, 1910), and therefore the Court affirmed it after having amended it by inserting the name of Chattin's alleged crime. The United States has alleged that, since the sentence rendered on February 6, 1911,

held that "the confession of the latter" (Ramírez) "does not constitute in itself a proof against the other" (Chattin), the Court confessed that Chattin's arrest had been illegal. No such inference can be made from the words cited, though the thought might have been expressed more clearly; a statement, insufficient as evidence for a conviction, can under Mexican law (as under the laws of many other countries) furnish a wholly sufficient basis for an arrest and formal imprisonment.

6. Before taking up the allegations relative to irregular court proceedings against Chattin and to his having been convicted on insufficient evidence, it seems proper to establish that the present case is of a type different from most other cases so far examined by this Commission in which defective administration of justice was alleged.

7. In the *Kennedy* case (Docket No. 7) and nineteen more cases before this Commission it was contended that, a citizen of either country having been wrongfully damaged either by a private individual or by an executive official, the judicial authorities had failed to take proper steps against the person or persons who caused the loss or damage. A governmental liability proceeding from such a source is usually called "indirect liability," though, considered in connection with the alleged delinquency of the government itself, it is quite as direct as its liability for any other act of its officials. The liability of the government may be called remote or secondary only when compared with the liability of the person who committed the wrongful act (for instance, the murder) for that very act. Such cases of *indirect governmental liability* because of lack of proper action by the judiciary are analogous to cases in which a government might be held responsible for denial of justice in connection with nonexecution of private contracts, or in which it might become liable to victims of private or other delinquencies because of lack of protection by its executive or legislative authorities.

8. Distinct from this so-called indirect government liability is the *direct responsibility* incurred on account of acts of the government itself, or its officials, unconnected with any previous wrongful act of a citizen. If such governmental acts are acts of *executive* authorities, either in the form of breach of government contracts made with private foreigners, or in the form of other delinquencies of public authorities, they are at once recognized as acts involving direct liability; for instance, collisions caused by public vessels, reckless shooting by officials, unwarranted arrest by officials, mistreatment in jail by officials, deficient custody by officials, etc. As soon, however, as mistreatment of foreigners *by the courts* is alleged to the effect that damage sustained is caused by the *judiciary* itself, a confusion arises from the fact that authors often lend the term "denial of justice" as well to these cases of the second category, which are different

in character from a "denial of justice" of the first category. So also did the tribunal in the *Yuille, Shortridge & Company* case (under the British memorandum of March 8, 1861, accepted by Portugal; De Lapradelle et Politis, II, at 103), so Umpire Thornton sometimes did in the 1868 Commission (Moore, 3140, 3141, 3143; *Burn, Pratt* and *Ada* cases). It would seem preferable not to use the expression in this manner. The very name "denial of justice" (*dénégation de justice, déni de justice*) would seem inappropriate here, since the basis of claims in these cases does not lie in the fact that the courts refuse or deny redress for an injustice sustained by a foreigner because of an act of someone else, but lies in the fact that the courts themselves did injustice. In the British and American claims arbitration Arbitrator Pound one day put it tersely in saying that there must be "an injustice antecedent to the denial, and then the denial after it" (Nielsen's *Report*, 258, 261).

9. How confusing it must be to use the term "denial of justice" for both categories of governmental acts, is shown by a simple deduction. If "denial of justice" covers not only governmental acts implying so-called indirect liability, but also acts of direct liability, and if, on the other hand, "denial of justice" is applied to acts of executive and legislative authorities as well as to acts of judicial authorities—as is often being done—there would exist no international wrong which would not be covered by the phrase "denial of justice," and the expression would lose its value as a technical distinction.

10. The practical importance of a consistent cleavage between these two categories of governmental acts lies in the following. In cases of direct responsibility, insufficiency of governmental action entailing liability is not limited to flagrant cases such as cases of bad faith or wilful neglect of duty. So, at least, it is for the non-judicial branches of government. Acts of the *judiciary*, either entailing direct responsibility or indirect liability (the latter called denial of justice, proper), are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man. Acts of the executive and legislative branches, on the contrary, share this lot only then, when they engender a so-called *indirect* liability in connection with acts of others; and the very reason why this type of acts often is covered by the same term "denial of justice" in its broader sense may be partly in this, that to such acts or inactivities of the executive and legislative branches engendering *indirect* liability, the rule applies that a government cannot be held responsible for them unless the wrong done amounts to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.

With reference to *direct* liability for acts of the executive it is different. In the *Mermaid* case (under the Convention of March 4, 1868, between Great Britain and Spain) the Commissioners held that even an act of mere clumsiness on the part of a gunboat—a cannon shot fired at a ship in an awkward way—when resulting in injustice renders the government to whom that public vessel belongs liable (De Lapradelle et Politis, II, 496; compare Moore, 5016). In the *Union Bridge Company* case the British American arbitral tribunal decided that an act of an executive officer may constitute an international tort for which his country is liable, even though he acts under an erroneous impression and without wrongful intentions (Nielsen's *Report*, at 380.) This Commission, in paragraph 12 of its opinion in the *Illinois Central Railroad Company* case (Docket No. 432), rendered March 31, 1926, held that liability can be predicated on non-performance of government contracts even where none of these aggravating circumstances is involved; and a similar view regarding responsibility for other acts of executive officers was held in paragraph 7 of its opinion in the *Okie* case (Docket No. 275), rendered March 31, 1926,² and in paragraph 9 of the first opinion in the *Venable* case (Docket No. 603). Typical instances of direct damage caused by the judiciary—"denial of justice" improperly so called—are the *Rozas* and *Driggs* cases (Moore, 3124-3126; not the *Driggs* case in Moore, 3160); before this Commission the *Faulkner*, *Roberts*, *Turner*, and *Strother* cases (Docket Nos. 47, 185, 1327 and 3088) presented instances of this type, in so far as the allegation of illegal *judicial* proceedings was involved therein. . . .

11. When, therefore, the American Agency in its brief mentions with great emphasis the existence of a "denial of justice" in the *Chattin* case, it should be realized that the term is used in its improper sense which sometimes is confusing. It is true that *both* categories of government responsibility—the direct one and the so-called indirect one—should be brought to the test of international standards in order to determine whether an international wrong exists, and that for *both* categories convincing evidence is necessary to fasten liability. It is moreover true that, as far as acts of the *judiciary* are involved, the view applies to *both* categories that "it is a matter of the greatest political and international delicacy for one country to disacknowledge the judicial decision of a court of another country" (*Garrison's* case; Moore, 3129), and to *both* categories the rule applies that state responsibility is limited to judicial acts showing outrage, bad faith, wilful neglect of duty, or manifestly insufficient governmental action. But the distinction becomes of importance whenever acts of the *other* branches of government are concerned; then the limitation of liability (as it exists for *all* judicial acts) does not apply to the category of direct responsibility, but only to the category of so-called indirect or derivative

responsibility for acts of the executive and legislative branches, for instance on the ground of lack of protection against acts of individuals.

12. The next allegation on the American side is that Chattin's trial was held in an illegal manner. The contentions are: (a) that the Governor of the State, for political reasons, used his influence to have this accused and three of his fellow conductors convicted; (b) that the proceedings against the four conductors were consolidated without reason; (c) that the proceedings were unduly delayed; (d) that an exorbitant amount of bail was required; (e) that the accused was not duly informed of the accusations; (f) that the accused lacked the aid of counsel; (g) that the accused lacked the aid of an interpreter; (h) that there were no oaths required of the witnesses; (i) that there was no such a thing as a confrontation between the witnesses and the accused; and (j) that the hearings in open court which led to sentences of from two years' to two years and eight months' imprisonment lasted only some five minutes. It was also contended that the claimant had been forced to march under guard through the streets of Mazatlán,* but the Commission in paragraph 3 of its opinion in the *Faulkner* case (Docket No. 47) rendered November 2, 1926, has already held that such treatment is incidental to the treatment of detention and suspicion, and cannot in itself furnish a separate basis for a complaint.

13. As to illegal efforts made by the Governor of Sinaloa to influence the trial and the sentence (allegation a), the only evidence consists in hearsay or suppositions about such things as what the Governor had in mind, or what the Judge has said in private conversation; hearsay and suppositions which often come from persons connected with those colleagues of Chattin's who shared his fate. To uncorroborated talk of this kind the Commission should not pay any attention. The record contains several allegations about lawyers being unwilling to give or to continue their services because of fear of the Governor of Sinaloa; but the only statement of this kind proceeding from a lawyer himself relates to an undisclosed behavior on his part which displeased quite as much the college where he was teaching as a professor, as it displeased the Governor of the State. Among these lawyers who presented bills for large fees, but, according to the record, did not take any interest at all in their clients, and did not avail themselves of the rights accorded by Mexican law in favor of accused persons, there was one who seems to have been willing, only if he were appointed official consulting attorney for the American consulate, not merely to become quite active but also to drop at once his fear of the Governor. It took another lawyer thirty-eight days to decline a request to act as counsel on appeal. If really these lawyers have behaved as it would seem from the record, their boastful pretenses and feeble activities were not a credit to the Mexican nation. The Government of Mexico evidently can-

not be held liable for that; but if conditions sometimes are in parts of Mexico as they were then in Sinaloa, it might be well to explicitly obligate the Judge by law to inform the accused ones of their several rights, both during the investigations and the trial. . . .

15. For undue delay of the proceedings (allegation c), there is convincing evidence in more than one respect. The formal proceedings began on July 9, 1910. Chattin was not heard in court until more than one hundred days thereafter. The stubs and perhaps other pieces of evidence against Chattin were presented to the Court on August 3, 1910; Chattin, however, was not allowed to testify regarding them until October 28, 1910. Between the end of July, and October 8, 1910, the Judge merely waited. The date of an alleged railroad ticket delinquency of Chattin's (June 29, 1910) was given by a witness on October 21, 1910; but investigation of Chattin's collection report of that day was not ordered until November 11, 1910, and he was not heard regarding it until November 16, nor confronted with the only two witnesses (Delgado and Sarabia) until November 17, 1910. The witnesses named by Ramírez in July were not summoned until after November 22, 1910, at the request of the Prosecuting Attorney, with the result that, on the one hand, several of them—including the important witness Manual Virgen—had gone, and that, on the other hand, the proceedings had to be extended from November 18, to December 13. On September 3, 1910, trial had been denied Parrish, and on November 5, it was denied Chattin, Haley and Englehart; though no testimony against them was ever taken after October 21 (Chattin), and though the absence of the evidence ordered on November 11 and after November 22 was due exclusively to the Judge's laches. Unreliability of Ramírez's confession had been suggested by Chattin's lawyer on August 16, 1910; but it apparently was only after a similar suggestion of Camou on October 6, 1910, that the Judge discovered that the confession of Ramírez did not "constitute in itself a proof against" Chattin. New evidence against Chattin was sought for. It is worthy of note that one of the two new witnesses, Estebán Delgado, who was summoned on October 12, 1910, had already been before the police prefect on July 8, 1910, in connection with Ramírez's alleged crime. If the necessity of new evidence was not seriously felt before October, 1910, this means that the Judge either has not in time considered the sufficiency of Ramírez's confession as proof against Chattin, or has allowed himself an unreasonable length of time to gather new evidence. The explanation cannot be found in the consolidation of Chattin's case with those of his three fellow conductors, as there is no trace of any judicial effort to gather new testimony against these men after July, 1910. Another remarkable proof of the measure of speed which the Judge deemed due to a man deprived of his liberty, is in that, whereas Chattin appealed from the decree of his

formal imprisonment on July 11, 1910—an appeal which would seem to be of rather an urgent character—"the corresponding copy for the appeal" was not remitted to the Appellate Court until September 12, 1910; this Court did not render judgment until October 27, 1910; and though its decision was forwarded to Mazatlán on October 31, 1910, its receipt was not established until November 12, 1910. . . .

22. The whole of the proceedings discloses a most astonishing lack of seriousness on the part of the Court. There is no trace of an effort to have the two foremost pieces of evidence explained (paragraphs 14 and 17 above). There is no trace of an effort to find one Manual Virgen, who, according to the investigations of July 21, 1910, might have been mixed in Chattin's dealings, nor to examine one Carl or Carrol Collins, a dismissed clerk of the railroad company concerned, who was repeatedly mentioned as forging tickets and passes and as having been discharged for that very reason. One of the Mexican brakemen, Batriz, stated on August 8, 1910, in court that "it is true that the American conductors have among themselves schemes to defraud in that manner the company, the deponent not knowing it for sure"; but again no steps were taken to have this statement verified or this brakeman confronted with the accused Americans. No disclosures were made as to one pass, one "half-pass" and eight perforated tickets shown to Chattin on October 28, 1910, as pieces of evidence; the record states that they were the same documents as presented to Ramírez on July 9, 1910, but does not attempt to explain why their number in July was eight (seven tickets and one pass) and in October was ten. No investigation was made as to why Delgado and Sarabia felt quite certain that June 29 was the date of their trip, a date upon the correctness of which the weight of their testimony wholly depended. No search of the houses of these conductors is mentioned. Nothing is revealed as to a search of their persons on the days of their arrest; when the lawyer of the other conductors, Haley and Englehart, insisted upon such an inquiry, a letter was sent to the Judge at Culiacán, but was allowed to remain unanswered. Neither during the investigations nor during the hearings in open court was any such thing as an oral examination or cross-examination of any importance attempted. It seems highly improbable that the accused have been given a real opportunity during the hearings in open court, freely to speak for themselves. It is not for the Commission to endeavor to reach from the record any conviction as to the innocence or guilt of Chattin and his colleagues; but even in case they were guilty, the Commission would render a bad service to the Government of Mexico if it failed to place the stamp of its disapproval and even indignation on a criminal procedure so far below international standards of civilization as the present one. If the wholesome rule of international law as to respect for the judiciary of

another country—referred to in paragraph 11 above—shall stand, it would seem of the utmost necessity that appellate tribunals when, in exceptional cases, discovering proceedings of this type should take against them the strongest measures possible under constitution and laws, in order to safeguard their country's reputation.

23. The record seems to disclose that an action in *amparo* has been filed by Chattin and his colleagues against the District Judge at Mazatlán and the Magistrate of the Third Circuit Court at Mexico City, but was disallowed by the Supreme Court of the Nation on December 2, 1912.

24. In Mexican law, as in that of other countries, an accused can not be convicted unless the Judge is convinced of his guilt and has acquired this view from legal evidence. An international tribunal never can replace the important first element, that of the Judge's being convinced of the accused's guilt; it can only in extreme cases, and then with great reserve, look into the second element, the legality and sufficiency of the evidence. . . .

26. From the record there is not convincing evidence that the proof against Chattin, scanty and weak though it may have been, was not such as to warrant a conviction. Under the article deemed applicable the medium penalty fixed by law was imposed, and deduction made of the seven months Chattin had passed in detention from July, 1910, till February, 1911. It is difficult to understand the sentence unless it be assumed that the Court, for some reason or other, wished to punish him severely. The most acceptable explanation of this supposed desire would seem to be the urgent appeals made by the American chief manager of the railroad company concerned, the views expressed by him and contained in the record, and the dangerous collection of anonymous accusations which were not only inserted in the court record at the very last moment, but which were even quoted in the decision of February 6, 1911, as evidence to prove "illegal acts of the nature which forms the basis of this investigation." The allegation that the Court in this matter was biased against American citizens would seem to be contradicted by the fact that, together with the four Americans, five Mexicans were indicted as well, four of whom had been caught and have subsequently been convicted—that one of these Mexicans was punished as severely as the Americans were—and that the lower penalties imposed on the three others are explained by motives which, even if not shared, would seem reasonable. The fact that the Prosecuting Attorney who did not share the Judge's views applied merely for "insignificant penalties"—as the first decision establishes—shows, on the one hand, that he disagreed with the Court's wish to punish severely and with its interpretation of the Penal Code, but shows on the other hand that he also considered the evidence against Chattin a sufficient basis for his conviction. If Chattin's guilt was sufficiently proven, the small amount of the embezzlement (four

pesos) need not in itself have prevented the Court from imposing a severe penalty.

27. It has been suggested as most probable that after Chattin's escape and return to the United States no demand for his extradition has been made by the Mexican Government, and that this might imply a recognition on the side of Mexico that the sentence had been unjust. Both the disturbed conditions in Mexico since 1911, and the little chance of finding the United States disposed to extradite one of its citizens by way of exception, might easily explain the absence of such a demand, without raising so extravagant a supposition as Mexico's own recognition of the injustice of Chattin's conviction. . . .

29. Bringing the proceedings of Mexican authorities against Chattin to the test of international standards (paragraph 11), there can be no doubt of their being highly insufficient. Inquiring whether there is convincing evidence of these unjust proceedings (paragraph 11), the answer must be in the affirmative. Since this is a case of alleged responsibility of Mexico for injustice committed by its judiciary, it is necessary to inquire whether the treatment of Chattin amounts even to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action recognizable by every unbiased man (paragraph 11); and the answer here again can only be in the affirmative.

30. An illegal arrest of Chattin is not proven. Irregularity of court proceedings is proven with reference to absence of proper investigations, insufficiency of confrontations, withholding from the accused the opportunity to know all of the charges brought against him, undue delay of the proceedings, making the hearings in open court a mere formality, and a continued absence of seriousness on the part of the Court. Insufficiency of the evidence against Chattin is not convincingly proven; intentional severity of the punishment is proven, without its being shown that the explanation is to be found in unfairmindedness of the Judge. Mistreatment in prison is not proven. Taking into consideration, on the one hand, that this is a case of direct governmental responsibility, and, on the other hand, that Chattin, because of his escape, has stayed in jail for eleven months instead of for two years, it would seem proper to allow in behalf of this claimant damages in the sum of \$5,000.00, without interest.

The Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America, on behalf of B. E. Chattin, \$5,000.00 (five thousand dollars), without interest. . . .

[Separate opinions of Commissioners Nielsen and MacGregor are omitted.]

§ 77. STATE CONTRACTS: THE "CALVO CLAUSE"

The following Opinion was handed down by the General Claims Commission described in the introduction to § 76 above. The claim was presented to the Commission by the United States on behalf of the North American Dredging Co., a Texas corporation, and is an important discussion of the so-called "Calvo Clause."

Mr. A. H. Feller, after a discussion of this Opinion, remarks: "Despite the criticism to which the opinion in the *North American Dredging* case is open, it has had an important influence. It has generally been accepted to this extent: a contractual stipulation which purports to bind the claimant not to apply to his government to intervene in the event of a denial of justice or in respect of violations of international law is void, but a contractual stipulation that the local courts shall have exclusive jurisdiction over all matters pertaining to the contract is valid and binding on an international tribunal. This, in effect, is nothing more than a restatement of the well settled rule that local remedies must be exhausted."—*The Mexican Claims Commissions, 1923-1934*, Bureau of International Research, Harvard University (1935), p. 192.

United States (North American Dredging Co.) v. United Mexican States

UNITED STATES-MEXICO, GENERAL CLAIMS COMMISSION, 1926

Opinions of Commissioners (1927), p. 21.

[By the Commission.] This case is before this Commission on a motion of the Mexican Agent to dismiss. It is put forward by the United States of America on behalf of North American Dredging Company of Texas, an American corporation, for the recovery of the sum of \$233,523.30 with interest thereon, the amount of losses and damages alleged to have been suffered by claimant for breaches of a contract for dredging at the port of Salina Cruz, which contract was entered into between the claimant and the Government of Mexico, November 23, 1912. The contract was signed at Mexico City. The Government of Mexico was a party to it. It had for its subject matter services to be rendered by the claimant in Mexico. Payment therefor was to be made in Mexico. Article 18, incorporated by Mexico as an indispensable provision, not separable from the other provisions of the contract, was subscribed to by the claimant for the purpose of securing the award of the contract. Its translation by the Mexican Agent reads as follows:

The contractor and all persons who, as employees or in any other capacity, may be engaged in the execution of the work under this contract either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfillment of this contract. They shall not claim, nor shall they have,

with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans, nor shall they enjoy any other rights than those established in favor of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract.

1. The jurisdiction of the Commission is challenged in this case on the grounds (first) that claims based on an alleged nonperformance of contract obligations are outside the jurisdiction of this Commission and (second) that a contract containing the so-called Calvo clause deprives the party subscribing said clause of the right to submit any claims connected with his contract to an international commission.

2. The Commission, in its decision this day rendered on the Mexican motion to dismiss the Illinois Central Railroad Company case, Docket No. 432, has stated the reasons why it deems contractual claims to fall within its jurisdiction. It is superfluous to repeat them. The first ground of the motion is therefore rejected.

3. The Commission is fully sensible of the importance of any judicial decision either sustaining in whole or in part, or rejecting in whole or in part, or construing the so-called "Calvo clause" in contracts between nations and aliens. It appreciates the legitimate desire on the part of nations to deal with persons and property within their respective jurisdictions according to their own laws and to apply remedies provided by their own authorities and tribunals, which laws and remedies in no wise restrict or limit their international obligations, or restrict or limit or in any wise impinge upon the correlative rights of other nations protected under rules of international law. The problem presented in this case is whether such legitimate desire may be accomplished through appropriate and carefully phrased contracts; what form such a contract may take; what is its scope and its limitations; and does clause 18 of the contract involved in this case fall within the field where the parties are free to contract without violating any rule of international law?

4. The Commission does not feel impressed by arguments either in favor of or in opposition to the Calvo clause, in so far as these arguments go to extremes. The Calvo clause is neither upheld by all outstanding international authorities and by the soundest among international awards nor is it universally rejected. The Calvo clause in a specific contract is neither a clause which must be sustained to its full length because of its contractual nature nor can it be discretionarily separated from the rest of the contract as if it were just an accidental postscript. The problem is not solved by saying yes or no; the affirmative answer exposing the rights of foreigners to undeniable dangers, the negative answer leaving to the nations involved no

alternative except that of exclusion of foreigners from business. The present stage of international law imposes upon every international tribunal the solemn duty of seeking for a proper and adequate balance between the sovereign right of national jurisdiction, on the one hand, and the sovereign right of national protection of citizens on the other. No international tribunal should or may evade the task of finding such limitations of both rights as will render them compatible within the general rules and principles of international law. By merely ignoring world-wide abuses either of the right of national protection or of the right of national jurisdiction no solution compatible with the requirements of modern international law can be reached.

5. At the very outset the Commission rejects as unsound a presentation of the problem according to which if article 18 of the present contract were upheld Mexico or any other nation might lawfully bind all foreigners by contract to relinquish all rights of protection by their governments. It is quite possible to recognize as valid some forms of waiving the right of foreign protection without thereby recognizing as valid and lawful every form of doing so.

6. The Commission also denies that the rules of international public law apply only to nations and that individuals can not under any circumstances have a personal standing under it. As illustrating the antiquated character of this thesis it may suffice to point out that in article 4 of the unratified International Prize Court Convention adopted at The Hague in 1907 and signed by both the United States and Mexico and by 29 other nations this conception, so far as ever held, was repudiated.

7. It is well known how largely the increase of civilization, intercourse, and interdependence as between nations has influenced and moderated the exaggerated conception of national sovereignty. As civilization has progressed individualism has increased; and so has the right of the individual citizen to decide upon the ties between himself and his native country. There was a time when governments and not individuals decided if a man was allowed to change his nationality or his residence, and when even if he had changed either of them his government sought to lay burdens on him for having done so. To acknowledge that under the existing laws of progressive, enlightened civilization a person may voluntarily expatriate himself but that short of expatriation he may not by contract, in what he conceives to be his own interest, to any extent loosen the ties which bind him to his country is neither consistent with the facts of modern international intercourse nor with corresponding developments in the field of international law and does not tend to promote good will among nations.

8. The contested provision, in this case, is part of a contract and must

be upheld unless it be repugnant to a recognized rule of international law. What must be established is not that the Calvo clause is universally accepted or universally recognized, but that there exists a generally accepted rule of international law condemning the Calvo clause and denying to an individual the right to relinquish to any extent, large or small, and under any circumstances or conditions, the protection of the government to which he owes allegiance. Only in case a provision of this or any similar tendency were established could a parallel be drawn between the illegality of the Calvo clause in the present contract and the illegality of a similar clause in the Arkansas contract declared void in 1922 by the Supreme Court of the United States (*Terral v. Burke Construction Co.*, 257 U. S. 529) because of its repugnance to American statute provisions. It is as little doubtful nowadays as it was in the day of the Geneva Arbitration that international law is paramount to decrees of nations and to municipal law; but the task before this Commission precisely is to ascertain whether international law really contains a rule prohibiting contract provisions attempting to accomplish the purpose of the Calvo clause.

9. The commission does not hesitate to declare that there exists no international rule prohibiting the sovereign right of a nation to protect its citizens abroad from being subject to any limitation whatsoever under any circumstances. The right of protection has been limited by treaties between nations in provisions related to the Calvo clause. While it is true that Latin-American countries—which are important members of the family of nations and which have played for many years an important and honorable part in the development of international law—are parties to most of these treaties, still such countries as France, Germany, Great Britain, Sweden, Norway, and Belgium, and in one case at least even the United States of America (Treaty between the United States and Peru, dated September 6, 1870, Volume 2, Malloy's United States Treaties, at page 1426; article 37) have been parties to treaties containing such provisions.

10. What Mexico has asked of the North American Dredging Company of Texas as a condition for awarding it the contract which it sought is, "If all of the means of enforcing your rights under this contract afforded by Mexican law, even against the Mexican Government itself, are wide open to you, as they are wide open to our own citizens, will you promise not to ignore them and not to call directly upon your own Government to intervene in your behalf in connection with any controversy, small or large, but seek redress under the laws of Mexico through the authorities and tribunals furnished by Mexico for your protection?" and the claimant, by subscribing to this contract and seeking the benefits which were to accrue to him thereunder, has answered, "I promise."

11. Under the rules of international law may an alien lawfully make

such a promise? The Commission holds that he may, but at the same time holds that he can not deprive the government of his nation, of its undoubted right of applying international remedies to violations of international law committed to his damage. Such government frequently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens in a particular case, and manifestly such citizen can not by contract tie in this respect the hands of his government. But while any attempt to so bind his government is void, the Commission has not found any generally recognized rule of positive international law which would give to his government the right to intervene to strike down a lawful contract, in the terms set forth in the preceding paragraph 10, entered into by its citizen. The obvious purpose of such a contract is to prevent abuses of the right to protection, not to destroy the right itself—abuses which are intolerable to any self-respecting nation and are prolific breeders of international friction. The purpose of such a contract is to draw a reasonable and practical line between Mexico's sovereign right of jurisdiction within its own territory, on the one hand, and the sovereign right of protection of the government of an alien whose person or property is within such territory, on the other hand. Unless such line is drawn and if these two coexisting rights are permitted constantly to overlap, continual friction is inevitable.

12. It being impossible to prove the illegality of the said provision, under the limitations indicated, by adducing generally recognized rules of positive international law, it apparently can only be contested by invoking its incongruity to the law of nature (natural rights) and its inconsistency with inalienable, indestructible, unprescriptible, uncurtailable rights of nations. The law of nature may have been helpful, some three centuries ago, to build up a new law of nations, and the conception of inalienable rights of men and nations may have exercised a salutary influence, some one hundred and fifty years ago, on the development of modern democracy on both sides of the ocean; but they have failed as a durable foundation of either municipal or international law and can not be used in the present day as substitutes for positive municipal law, on the one hand, and for positive international law, as recognized by nations and governments through their acts and statements, on the other hand. Inalienable rights have been the cornerstones of policies like those of the Holy Alliance and of Lord Palmerston; instead of bringing to the world the benefit of mutual understanding, they are to weak or less fortunate nations an unrestrained menace.

13. What is the true meaning of article 18 of the present contract? It is essential to state that the closing words of the article should be combined so as to read: "being deprived, in consequence, of any rights as

aliens *in any matter connected with this contract*, and without the intervention of foreign diplomatic agents being in any case permissible *in any matter connected with this contract*." Both the commas and the phrasing show that the words "in any matter connected with this contract" are a limitation on either of the two statements contained in the closing words of the article.

14. Reading this article as a whole, it is evident that its purpose was to bind the claimant to be governed by the laws of Mexico and to use the remedies existing under such laws. The closing words "in any matter connected with this contract" must be read in connection with the preceding phrase "in everything connected with the execution of such work and the fulfillment of this contract" and also in connection with the phrase "regarding the interests or business connected with this contract." In other words, in executing the contract, in fulfilling the contract, or in putting forth any claim "regarding the interests or business connected with this contract," the claimant should be governed by those laws and remedies which Mexico had provided for the protection of its own citizens. But this provision did not, and could not, deprive the claimant of his American citizenship and all that that implies. It did not take from him his undoubted right to apply to his own Government for protection if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or delay of justice as that term is used in international law. In such a case the claimant's complaint would be not that his contract was violated but that he had been denied justice. The basis of his appeal would be not a construction of his contract, save perchance in an incidental way, but rather an internationally illegal act.

15. What, therefore, are the rights which claimant waived and those which he did not waive in subscribing to article 18 of the contract? (a) He waived his right to conduct himself as if no competent authorities existed in Mexico; as if he were engaged in fulfilling a contract in an inferior country subject to a system of capitulations; and as if the only real remedies available to him in the fulfillment, construction, and enforcement of this contract were international remedies. All these he waived and had a right to waive. (b) He did not waive any right which he possessed as an American citizen as to any matter not connected with the fulfillment, execution, or enforcement of this contract as such. (c) He did not waive his undoubted right as an American citizen to apply to his Government for protection against the violation of international law (internationally illegal acts) whether growing out of this contract or out of other situations. (d) He did not and could not affect the right of his Government to extend to him its protection in general or to extend to him its protection against breaches of international law. But he did frankly

and unreservedly agree that in consideration of the Government of Mexico awarding him this contract, he did not need and would not invoke or accept the assistance of his Government with respect to the fulfillment and interpretation of his contract and the execution of his work thereunder. The conception that a citizen in doing so impinges upon a sovereign, inalienable, unlimited right of his government belongs to those ages and countries which prohibited the giving up of his citizenship by a citizen or allowed him to relinquish it only with the special permission of his government.

16. It is quite true that this construction of article 18 of the contract does not effect complete equality between the foreigner subscribing the contract on the one hand and Mexicans on the other hand. Apart from the fact that equality of legal status between citizens and foreigners is by no means a requisite of international law—in some respects the citizen has greater rights and larger duties, in other respects the foreigner has—article 18 only purposes equality between the foreigner and Mexicans with respect to the execution, fulfillment, and interpretation of this contract and such limited equality is properly obtained.

17. The Commission ventures to suggest that it would strengthen and stimulate friendly relations between nations if in the future such important clauses in contracts as article 18 in the contract in question were couched in such clear, simple, and straightforward language, frankly expressing its purpose with all necessary limitations and restraints as would preclude the possibility of misinterpretation and render it insusceptible of such extreme construction as sought to be put upon article 18 in this instance, which if adopted would result in striking it down as illegal.

18. If it were necessary to demonstrate how legitimate are the fears of certain nations with respect to abuses of the right of protection and how seriously the sovereignty of those nations within their own boundaries would be impaired if some extreme conceptions of this right were recognized and enforced, the present case would furnish an illuminating example. The claimant, after having solemnly promised in writing that it would not ignore the local laws, remedies, and authorities, behaved from the very beginning as if article 18 of its contract had no existence in fact. It used the article to procure the contract, but this was the extent of its use. It has never sought any redress by application to the local authorities and remedies which article 18 liberally granted it and which, according to Mexican law, are available to it, even against the Government, without restrictions, both in matter of civil and of public law. It has gone so far as to declare itself freed from its contract obligations by its *ipse dixit* instead of having resort to the local tribunals to construe its contract and its rights thereunder. And it has gone so far as to declare that it was

not bound by article 7 of the contract and to forcibly remove a dredge to which, under that article, the Government of Mexico considered itself entitled as security for the proper fulfillment of its contract with claimant. While its behavior during the spring and summer of 1914, the latter part of the Huerta administration, may be in part explained by the unhappy conditions of friction then existing between the two countries in connection with the military occupation of Veracruz by the United States, this explanation can not be extended from the year 1917 to the date of the filing of its claim before this Commission, during all of which time it has ignored the open doors of Mexican tribunals. The record before this Commission strongly suggests that the claimant used article 18 to procure the contract with no intention of ever observing its provisions. . . .

20. Under article 18 of the contract declared upon the present claimant is precluded from presenting to its Government any claim relative to the interpretation or fulfillment of this contract. If it had a claim for denial of justice, for delay of justice or gross injustice, or for any other violation of international law committed by Mexico to its damage, it might have presented such a claim to its Government, which in turn could have espoused it and presented it here. Although the claim as presented falls within the first clause of Article I of the Treaty, describing claims coming within this Commission's jurisdiction, it is not a claim that may be rightfully presented by the claimant to its Government for espousal and hence is not cognizable here, pursuant to the latter part of paragraph 1 of the same Article I.

21. It is urged that the claim may be presented by claimant to its Government for espousal in view of the provision of Article V of the Treaty, to the effect "that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim." This provision is limited to the application of a general principle of international law to claims that may be presented to the Commission falling within the terms of Article I of the Treaty, and if under the terms of Article I the private claimant can not rightfully present its claim to its Government and the claim therefore can not become cognizable here, Article V does not apply to it, nor can it render the claim cognizable, nor does it entitle either Government to set aside an express valid contract between one of its citizens and the other Government.

22. Manifestly it is impossible for this Commission to announce an all-embracing formula to determine the validity or invalidity of all clauses partaking of the nature of the Calvo clause, which may be found in contracts, decrees, statutes, or constitutions, and under widely varying condi-

tions. Whenever such a provision is so phrased as to seek to preclude a Government from intervening, diplomatically or otherwise, to protect its citizen whose rights of any nature have been invaded by another Government in violation of the rules and principles of international law, the Commission will have no hesitation in pronouncing the provision void. Nor does this decision in any way apply to claims not based on express contract provisions in writing and signed by the claimant or by one through whom the claimant has deraigned title to the particular claim. Nor will any provision in any constitution, statute, law, or decree, whatever its form, to which the claimant has not in some form expressly subscribed in writing, howsoever it may operate or affect his claim, preclude him from presenting his claim to his Government or the Government from espousing it and presenting it to this Commission for decision under the terms of the Treaty.

23. Even so, each case involving application of a valid clause partaking of the nature of the Calvo clause will be considered and decided on its merits. Where a claim is based on an alleged violation of any rule or principle of international law, the Commission will take jurisdiction notwithstanding the existence of such a clause in a contract subscribed by such claimant. But where a claimant has expressly agreed in writing, attested by his signature, that in all matters pertaining to the execution, fulfillment, and interpretation of the contract he will have resort to local tribunals, remedies, and authorities, and then wilfully ignores them by applying in such matters to his Government, he will be held bound by his contract and the Commission will not take jurisdiction of such claim.

24. (a) The Treaty between the two Governments under which this Commission is constituted requires that a claim accruing before September 8, 1923, to fall within its jurisdiction must be that of a citizen of one Government against the other Government and must not only be espoused by the first Government and put forward by it before this Commission but, as a condition precedent to such espousal, must have been presented to it for its interposition by the private claimant.

(b) The question then arises, Has the private claimant in this case put itself in a position where it has the right to present its claim to the Government of the United States for its interposition? The answer to this question depends upon the construction to be given to article 18 of the contract on which the claim rests.

(c) In article 18 of the contract the claimant expressly agreed that in all matters connected with the execution of the work covered by the contract and the fulfillment of its contract obligations and the enforcement of its contract rights it would be bound and governed by the laws of Mexico administered by the authorities and courts of Mexico and would not invoke or accept the assistance of his Government. Further than this

it did not bind itself. Under the rules of international law the claimant (as well as the Government of Mexico) was without power to agree, and did not in fact agree, that the claimant would not request the Government of the United States, of which it was a citizen, to intervene in its behalf in the event of internationally illegal acts done to the claimant by the Mexican authorities.

(d) The contract declared upon, which was sought by claimant, would not have been awarded it without incorporating the substance of article 18 therein. The claimant does not pretend that it has made any attempt to comply with the terms of that article, which as here construed is binding on it. Therefore the claimant has not put itself in a position where it may rightfully present this claim to the Government of the United States for its interposition.

(e) While it is true that under Article V of the Treaty the two Governments have agreed "that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim," this provision is limited to claims falling under Article I and therefore rightfully presented by the claimant.

(f) If it were necessary to so construe article 18 of the contract as to bind the claimant not to apply to its Government to intervene diplomatically or otherwise in the event of a denial of justice to the claimant growing out of the contract declared upon or out of any other situation, then this Commission would have no hesitation in holding such a clause void *ab initio* and not binding on the claimant.

(g) The foregoing pertains to the power of the claimant to bind itself by contract. It is clear that the claimant could not under any circumstances bind its Government with respect to remedies for violations of international law.

(h) As the claimant voluntarily entered into a legal contract binding itself not to call as to this contract upon its Government to intervene in its behalf, and as all of its claim relates to this contract, and as therefore it can not present its claim to its Government for interposition or espousal before this Commission, the second ground of the motion to dismiss is sustained.

25. The Commission decides that the case as presented is not within its jurisdiction and the motion of the Mexican Agent to dismiss it is sustained and the case is hereby dismissed without prejudice to the claimant to pursue his remedies elsewhere or to seek remedies before this Commission for claims arising after the signing of the Treaty of September 8, 1923. . . .

[The concurring opinion of Commissioner Parker is omitted.]

§ 78. STATE CONTRACTS: RESPONSIBILITY FOR PAYMENT OF "GOLD CLAUSE" LOANS HELD BY FOREIGNERS

Case Concerning the Payment of Various Serbian Loans Issued in France

PERMANENT COURT OF INTERNATIONAL JUSTICE, 1929

Publications, Permanent Court of International Justice, Series A,
No. 20, pp. 32-49.

[Under a Special Agreement ratified May 16th, 1928, the Serbian and French Governments agreed to submit to the Permanent Court of International Justice the following questions:

[(a) Whether, as held by the Government of the Kingdom of the Serbs, Croats and Slovenes, the latter is entitled to effect in paper francs the service of its 4% 1895, 5% 1902, 4½% 1906, 4½% 1909 and 5% 1913 loans, as it has hitherto done;

[(b) or whether, on the contrary, the Government of the Kingdom of the Serbs, Croats and Slovenes, as held by the French bondholders, is under an obligation to pay in gold or in foreign currencies and at the places indicated hereinafter, the amount of the bonds drawn for redemption but not refunded and of those subsequently drawn, as also of coupons due for payment but not paid, and of those subsequently falling due for payment of the Serbian loans enumerated above, and in particular:

(1° Omitted.)

(2° Omitted.)

(3° Lastly, how the value of the gold franc is to be determined as between the Parties for the above-mentioned payments.)

[In a part of the Judgment omitted from this reprint, the Court examined the character of the dispute submitted to it, and concluded that the case was one between States over which it could entertain jurisdiction, and not merely a case between Serbia (Serb-Croat-Slovene State) and the individual French bondholders. "... by taking up a case on behalf of its nationals before an international tribunal, a State is asserting its own right—that is to say, its right to ensure in the person of its subject, respect for the rules of international law" While the present case was "exclusively concerned with relations between the borrowing State and private persons, that is to say relations which are, in themselves, within the domain of municipal law," the question whether the Serbian Government was conducting the service of the loans in accordance with its obligations was a matter of dispute between the two Governments which had led to negotiations between them. "It is this difference of opinion between the two Governments, and not the dispute between the Serb-Croat-Slovene Government and the

French holders of the loans, which is submitted by the Special Agreement to the Court."

[The Court then examined the terms of the documents embodying and interpreting bond contracts, and found throughout such expressions as "gold francs," "gold loan," "the payment of matured coupons and bonds drawn shall be in gold." It concluded that, "while the language of the several issues varies somewhat, it must be concluded that the promise in each case is for the payment of gold francs."

[The remaining part of the Judgment, with certain indicated omissions, is reprinted below.]

[By the Court:] . . .

Significance of the term "gold francs."—It is urged that the promise to pay gold francs or what is called the "gold clause" is without legal significance. It is said that there was no international gold franc; that the reference was to money and not to gold as merchandise; that the reference must be taken to be to French money; and that the French monetary unit was silver and that there was no "gold franc" as a monetary unit. Hence it is insisted that, despite the terms of the engagement, the promise must be construed as one to pay in French currency.

As it is fundamental that the terms of a contract qualifying the promise are not to be rejected as superfluous, and as the definitive use of the word "gold" cannot be ignored, the question is: What must be deemed to be the significance of that expression? It is conceded that it was the intention of the Parties to guard against the fluctuations of the Serbian dinar, and that, in order to procure the loans, it was necessary to contract for repayment in foreign money. But, in so contracting, the Parties were not content to use simply the word "franc," or to contract for payment in French francs, but stipulated for "gold francs." It is quite unreasonable to suppose that they were intent on providing for the giving in payment of mere gold specie, or gold coins, without reference to a standard of value. The treatment of the gold clause as indicating a mere modality of payment, without reference to a gold standard of value, would be, not to construe but to destroy it.

Moreover, the terms of the bonds make such an appreciation impossible. Thus, the bonds of 1895 call for the payment of principal and interest, at the option of the bondholders, not only at Paris in gold francs, but in Berlin at the rate of R.M. 8.10 in gold for each coupon and of R.M. 405 for each bond. There were no gold coins of the denomination required for such payments. The bonds of 1902 provide for payment of the quarterly interest of francs 6.25; the bonds of 1906 and 1909 for semi-annual interest of frs. 11.25; and those of 1913 for semi-annual interest of frs. 12.50. These were to be gold payments, but there were no gold coins for such amounts. It is

manifest that the Parties, in providing for gold payments, were referring, not to payment in gold coins, but to gold as standard of value. It would be in this way, naturally, that they would seek to avoid, as was admittedly their intention, the consequences of a fluctuation in the Serbian dinar.

The question, then, is whether there was a standard of value which was properly denoted by the term "gold franc." The payments in gold francs were to be made, in the case of the bonds of 1895, at Belgrade and Paris; and in those of 1902, 1906, 1909 and 1913, at Belgrade, Paris, Brussels and Geneva. Both at Brussels and Geneva, as well as at Paris, the monetary unit was the franc. While there was no international gold franc, as the franc in each case was established by the respective countries, the conception of the franc, and of the gold franc, had nevertheless achieved an international character as three countries had established a similar monetary unit, with the same definition of the gold piece of 20 francs in weight and fineness, and this unit had been made the subject of the Convention of the Latin Union. The "gold franc" thus constituted a well-known standard of value to which reference could appropriately be made in loan contracts when it was desired to establish a sound and stable basis for repayment.

But, while the "gold franc" was thus an internationally accepted standard of value, its definition was to be found in national laws. The French, and the initial definition of the "gold franc," which was later adopted by Belgium and Switzerland, and by the Convention of the Latin Union, was found in the law of the 17th Germinal, Year Eleven. This law provided as follows:

Translation

Five grams of silver, nine-tenths fine, shall constitute the monetary unit, which retains the name of franc.

HEAD I. THE MINTING OF MONEY

ARTICLE 6. Gold pieces of twenty and forty francs shall be minted.

ARTICLE 7. The standard of these pieces is fixed at nine-tenths fine with one-tenth of alloy.

ARTICLE 8. The standard weight of the pieces of 20 francs shall be one hundred and forty-five to the kilogram and that of the 40 francs pieces 77½ to the kilogram.

According to this definition, adopted and recognized by other countries as above stated, the gold franc, at the time of the bond issues in question, was the twentieth part of a piece of gold weighing 6.45161 grammes with a fineness of nine-tenths. It is this gold franc, with the weight and fineness thus enacted by law, which is stipulated particularly in Article 262 of the

Treaty of Versailles, in Article 214 of the Treaty of St. Germain, and in Article 197 of the Treaty of Trianon.

It is concluded that this was the gold standard of value to which the loan contracts referred.

As this standard of value was adopted by the Parties, it is not admissible to assert that the standard should not govern the payments because the depreciation in French currency was not foreseen, or, as it is insisted, could not be foreseen at the time the contracts were made. The question is not what the Parties actually foresaw, or could foresee, but what means they selected for their protection. To safeguard the repayment of the loans, they provided for payment in gold value having reference to a recognized standard, as above stated.

The provisions for payment in certain places at the rate of the sight exchange on Paris.—The bonds of the issues of 1902, 1906, 1909 and 1913, not only provide for the payment of interest in gold francs at Belgrade, Paris, Brussels and Geneva, but also for payment in other designated places, in the money of such places respectively, "*at the sight rate of exchange on Paris.*" In the bonds of 1902 and 1906, the provision relates to Berlin, Vienna and Amsterdam; in those of 1909, to Berlin, Frankfort-on-the-Main, Hamburg, St. Petersburg, Vienna and Amsterdam; and in those of 1913, to Berlin and Vienna. It is argued that these provisions indicate that the engagement was for the payment of the number of francs stated at the rate of sight exchange on Paris on the date the payment fell due, and hence that the payment was to be made on the basis of French francs, or French paper francs, of whatever value they might be at that time. But the provision is for the payment in gold, which, as has been said, must be taken to be gold value, with reference to the gold standard of value at the time of the loans. The mere provision for payment in the places named at the rate of exchange on Paris cannot affect the amount due: it must in fact be construed in the light of the principal stipulation which is for payment at gold value. That provision is plainly, not for the purpose of altering the amount agreed to be paid, but for the placing of the equivalent of that amount according to banking practice at the command of the bondholder in the foreign money in the designated cities. When it is ascertained what was the amount agreed to be paid, it is then simply a matter of calculation to determine the equivalent amount in the foreign currency of these places. The question, then, comes back to the terms of the agreement. This agreement was not simply for the payment of the stipulated amount in French francs, or in paper francs, but in gold francs, and as this referred to a well-known gold standard of value, it is according to that standard that the francs to be paid are to be computed.

It was evidently contemplated that the bondholder would receive the same amount whether he was paid in Belgrade, Paris, Brussels or Geneva. This was the intended result of providing for gold francs, which referred to the same standard of gold value as then existing at these places. It was this amount, and not a different amount, that the bondholder was to receive in the other cities, which did not have the franc, and the provision for the calculation at the rate of exchange on Paris was a matter of convenience but was clearly not intended to give the bondholder more or less than he would be entitled to receive at Brussels or Geneva. As the gold franc referred to a uniform standard, the calculation at the rate of exchange on Paris would give the desired amount, with very slight, if any, differences as compared with Brussels and Geneva.

The conclusion at which the Court has thus arrived is not affected by the fact that, for more or less extended periods gold specie in francs or a franc at gold parity was not quoted on the money market, as was the case at the time when the loans were issued; for the value can always be fixed either by comparison with the exchange rates of currency of a country in which gold coin is actually in circulation, or, should this not be possible, by comparison with the price of gold bullion. Once the gold value is fixed, it is its equivalent in money in circulation which constitutes the amount which is payable at Belgrade, Paris, Brussels and Geneva and at the other places enumerated in the bonds, in the local currency at the sight rate of exchange on Paris.

Payments at Geneva.—It is also to be observed with respect to provisions for payment in the bonds of the issues of 1902, 1906, 1909 and 1913, that the French bondholders, as well as others, are entitled to receive payment of the interest on these bonds at Geneva on the basis of the value of the gold franc. No distinction is made by reason of the nationality of the bondholders. At Geneva, the value of the gold franc has been maintained and no question has arisen between the Parties by reason of any Swiss legislation subsequent to the Serbian loan contracts. . . .

The execution of the loan contracts.—It appears that before the war, payment in Paris of the coupons of all these bonds, and of the principal of the bonds drawn for redemption, was made in the ordinary manner, that is, in bank-notes against deposits by the Serbian Government in the designated banks. During this period, the parity of French currency with gold was maintained and the manner of payment was not inconsistent with the right of the bondholders to receive payment on the basis of gold francs. During the war, the same practice continued as to payments made in Paris, but this fact has little significance, as during that period and until about 1919, there appears to have been only a slight difference in the value of French cur-

rency as compared with a gold basis, taking the gold dollar as a criterion; but in the subsequent period there was a great depreciation in French currency, in relation to the former gold value, until finally by the law of June 25th, 1928, the French franc was stabilized on a gold basis at approximately one-fifth of the value of the gold franc as it stood prior to the war. During this period of depreciation, payments on the Serbian loans in question continued to be made in French paper francs.

This conduct of the Parties, that is, the acceptance by the bondholders of depreciated paper francs, is invoked upon two distinct grounds. The first is that this method of executing the contract should be deemed to be controlling in determining the intention of the Parties, in accordance with the familiar principle applicable to ambiguous agreements. On this principle it is argued that the Parties did not intend by the loan contracts to provide for payment in gold francs. But the loan contracts are not ambiguous on this point. They are clear and definite. The fact that gold francs were not paid cannot be admitted to show that gold francs were not promised. If the subsequent conduct of the Parties is to be considered, it must be not to ascertain the terms of the loans, but whether the Parties by their conduct have altered or impaired their rights.

In the latter view, the principle known in Anglo-Saxon law as estoppel is sought to be applied. The argument developed by the Serb-Croat-Slovene Government in this connection leads the Court to consider the circumstances. The Special Agreement for the submission to the Court was signed in April 1928, but it seems that for a considerable time previously the question had been the subject of diplomatic negotiations between the two Governments, and the period which may have significance with respect to the conduct of the French bondholders is during the years from about 1919 to about 1925. On behalf of the bondholders, it is urged that there were large numbers of them; that it required time for them to arrange for concerted action; that it was necessary for them to interest the French Government in their case; that the French Government had to consider the matter and determine whether it would proceed to diplomatic negotiations on behalf of the bondholders; and that the delay, considering the incidents of governmental activity, is not extraordinary and should not lead to a denial of rights otherwise established. This position is not an unreasonable one, and when the requirements of the principle of estoppel to establish a loss of right are considered, it is quite clear that no sufficient basis has been shown for applying the principle in this case. There has been no clear and unequivocal representation by the bondholders upon which the debtor State was entitled to rely and has relied. There has been no change in position on the part of the debtor State. The Serbian debt remains as it was originally incurred; the only action taken by the debtor State has been to pay less than

the amount owing under the terms of the loan contracts. It does not even appear that the bondholders could have effectively asserted their rights earlier than they did, much less that there is any ground for concluding that they deliberately surrendered them. It may also be observed that the contract between borrower and lender finds its expression in bearer bonds, which entitle the bearer to claim, simply because he is a bearer, all the rights accruing under the bond.

It is also argued that, during the period of depreciated currency, the French and British Governments advanced to the debtor State amounts needed to meet the accruing payments on the bonds and that these amounts payable in Paris were calculated in depreciated paper francs. But it is manifest that this action could not be regarded as affecting the rights of the bondholders. It is also stated, apparently as a moral consideration, that there has been speculation in these bonds, and that the original subscribers have already taken their losses. How far this is true is not shown, but it is a matter with which the Court cannot concern itself in dealing, as provided in the Special Agreement, with the question of legal right. The French Government, as it was entitled to do, has taken up the cause of its nationals, and the legal questions submitted by the Special Agreement of the two States for determination by the Court do not turn on such market transactions.

Force majeure.—It cannot be maintained that the war itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian Government and the French bondholders. The economic dislocations caused by the war did not release the debtor State, although they may present equities which doubtless will receive appropriate consideration in the negotiations and—if resorted to—the arbitral determination for which Article II of the Special Agreement provides.

It is contended that under the operation of the forced currency régime of France, pursuant to the law of August 5th, 1914, payment in gold francs, that is, in specie, became impossible. But if the loan contracts be deemed to refer to the gold franc as a standard of value, payments of the equivalent amount of francs, calculated on that basis, could still be made. Thus, when the Treaty of Versailles became effective, it might be said that "gold francs," as stipulated in Article 262, of the weight and fineness as defined by law on January 1st, 1914, were no longer obtainable, and have not since been obtainable as gold coins *in specie*. But it could hardly be said that for this reason the obligation of the Treaty was discharged in this respect on the ground of impossibility of performance. That is the case of a treaty between States, and this is a case of loan contracts between a State and private persons or lenders. But, viewing the question, not as one of the source or basis of the original obligation, but as one of impossibility of performance, it

appears to be quite as impossible to obtain "gold francs" of the sort stipulated in Article 262 of the Treaty of Versailles as it is to obtain gold francs of the sort deemed to be required by the Serbian loan contracts.

The law applicable.—Having thus established the meaning which, on a reasonable construction, is to be attached to the terms of the bonds, the Court will now proceed to consider the subsidiary contentions of the Serb-Croat-Slovene Government to the effect that the obligations entered into are subject to French law which—it is alleged—renders a clause for payment in gold or at gold value null and void, at all events in so far as payment is to be effected in French money and in France.

As regards the question whether it is French law which governs the contractual obligations in this case, the Court makes the following observations:

Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country. The question as to which this law is forms the subject of that branch of law which is at the present day usually described as private international law or the doctrine of the conflict of laws. The rules thereof may be common to several States and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between States. But apart from this, it has to be considered that these rules form part of municipal law.

The Court, which has before it a dispute involving the question as to the law which governs the contractual obligations at issue, can determine what this law is only by reference to the actual nature of these obligations and to the circumstances attendant upon their creation, though it may also take into account the expressed or presumed intention of the Parties. Moreover, this would seem to be in accord with the practice of municipal courts in the absence of rules of municipal law concerning the settlement of conflicts of law.

Before proceeding to determine which this law is, it should however be observed that it may happen that the law which may be held by the Court to be applicable to the obligations in the case, may in a particular territory be rendered inoperative by a municipal law of this territory—that is to say, by legislation enacting a public policy the application of which is unavoidable even though the contract has been concluded under the auspices of some foreign law.

Again it should be observed that even apart from rules of public policy, it is quite possible that the same law may not govern all aspects of the obligation. The distinction which seems indicated for the purposes of this case is more particularly that between the substance of the debt and certain methods for the payment thereof.

In the first place, the law governing the obligations at the time at which they were entered into must be determined. In the Court's opinion, this law is Serbian law and not French law, at all events in so far as concerns the substance of the debt and the validity of the clause defining it.

The loans in question are loans contracted by the State of Serbia under special laws which lay down the conditions relating to them. These laws are cited in the bond; and it appears that the validity of the obligations set out in the said bonds is indisputable in Serbian law. The bonds are bearer bonds signed at Belgrade by representatives of the Serbian Government. It follows from the very nature of bearer bonds that, in respect of all holders, the substance of the debt is necessarily the same, and that the identity of the holder and the place where he obtained it are without relevancy. Only the individuality of the borrower is fixed: in this case it is a sovereign State which cannot be presumed to have made the substance of its debt and the validity of the obligations accepted by it in respect thereof, subject to any law other than its own.

Nevertheless, Serbia might have desired to make its loans subject to some other law, either generally, or in certain respects: if that were proved, there would seem to be nothing to prevent it. In this case, however, there is no express provision to this effect. The question therefore is whether, from the contents of the bond or other circumstances which are binding on the bondholders, the conclusion can be drawn that the State of Serbia intended that the loans in question should be, either generally speaking, or in certain respects, subject to French law—which is, according to the arguments, the only law in question.

The Serbian Government has in this connection cited various circumstances which, however, upon examination, do not support the conclusion which it deduces from them and in any case appear not to be binding on the bondholders. . . .

All things considered, the Court finds that, in regard to the Serbian loans in question, there are no circumstances which make it possible to establish that, either generally speaking or as regards the substance of the debt and the validity of the provisions relating thereto, the obligations entered into were, in the intention of the borrowing State, or in a manner binding upon the bondholders, made subject to French law.

But the establishment of the fact that the obligations entered into do not provide for voluntary subjection to French law as regards the substance of the debt, does not prevent the currency in which payment must or may be made in France from being governed by French law. It is indeed a generally accepted principle that a State is entitled to regulate its own currency. The application of the laws of such State involves no difficulty so long as it does not affect the substance of the debt to be paid and does not conflict

with the law governing such debt. In the present case this situation need not be envisaged, for the contention of the Serbian Government to the effect that French law prevents the carrying out of the gold stipulation, as construed above, does not appear to be made out.

In support of its contention, the Serb-Croat-Slovene Government cites amongst others the following French laws:

The law of Germinal of the Year XI, already mentioned above.
Article 1895 of the Civil Code, which is as follows:

Translation

The obligation resulting from a loan in money is always simply for the amount in figures indicated in the contract.

If there has been an increase or diminution of specie before the time of payment, the debtor must return the amount in figures lent and must return this amount only in the specie in currency at the time of payment.

Article 475, paragraph 11, of the Penal Code, which is as follows:

Translation

The following shall be punished by a fine of from 6 to 10 francs. . . .
11. Those who have refused to receive the national coin and currency, being neither counterfeit nor debased . . . at the value for which they are in circulation. . . .

The law of August 12th, 1870:

Translation

ARTICLE 1. As from the date of promulgation of this law, the notes of the Bank of France shall be accepted as legal tender by public offices and private persons.

The law of August 5th, 1914:

Translation

ARTICLE 3. Until otherwise provided by law, the Bank of France and the Bank of Algeria are released from the obligation to give specie in exchange for their notes.

The law of February 12th, 1916:

Translation

SINGLE ARTICLE. In war time, any person convicted of having bought, sold or parted with, of having attempted or proposed to buy, sell or part with national specie or currency, at a price exceeding their legal value, or for any consideration whatsoever, shall be sentenced to a penalty of from six days to six months imprisonment and to a fine of from one hundred to five thousand francs or to one of these two penalties only.

Sentence of confiscation of such national currency and specie shall *ipso facto* be passed against the delinquents and the currency or specie shall be devoted to the fund for relief of the poor.

Article 463 of the Penal Code shall apply as regards the offence dealt with by the present law; the law of suspension of execution of the sentence is only applicable in so far as concerns imprisonment.

In addition to these legislative provisions, the Serb-Croat-Slovene Government has cited a large number of opinions expressed by French writers and also certain judicial decisions which, in its contention, show that, upon a correct judicial construction, the legal currency of bank-notes taken in conjunction with the release from the obligation to exchange notes for specie (forced currency) compels every creditor to accept as due payment of a debt in French francs, inconvertible bank-notes, at their face value, and renders inoperative or null and void, at all events in France, any provision involving a distinction between these notes and metal currency.

For its part, the French Government has sought to show that this construction is not sound and that it is contrary to the law as stated by the Court of Cassation and other French courts since 1920. This Government also has cited a number of publicists and judicial decisions and has submitted that it is now definitely established by these decisions that although a gold stipulation is null and void when it relates to a domestic transaction, this does not hold good in the case of international contracts, even when payment is to be effected in France. And it has represented that if the law which must be applied is French law, it must be applied as construed by the courts.

The Court, having in these circumstances to decide as to the meaning and scope of a municipal law, makes the following observations: For the Court itself to undertake its own construction of municipal law, leaving on one side existing judicial decisions, with the ensuing danger of contradicting the construction which has been placed on such law by the highest national tribunal and which, in its results, seems to the Court reasonable, would not be in conformity with the task for which the Court has been established and would not be compatible with the principles governing the selection of its members. It would be a most delicate matter to do so, especially in cases concerning public policy—a conception the definition of which in any particular country is largely dependent on the opinion prevailing at any given time in such country itself—and in cases where no relevant provisions directly relate to the question at issue. It is French legislation, as applied in France, which really constitutes French law, and if that law does not prevent the fulfilment of the obligations in France in accordance with the stipulations made in the contract, the fact that the terms of legislative provisions are capable of a different construction is irrelevant.

In these circumstances, the Court will confine itself to observing that, according to the information furnished by the Parties, the doctrine of French courts, after some oscillation, has now been established in the manner indicated by the French Government, and that consequently there is nothing to prevent the creditor from claiming in France, in the present case, the gold value stipulated for.

It should, however, be added that, since the conclusion of the Special Agreement in March 1928, a new currency law has been promulgated in France, on June 25th, 1928, which, by its first article, abrogates Article 3 of the law of August 5th, 1914, regarding forced currency, and which contains the following provision in its second article:

The French monetary unit, the franc, is constituted by 65.5 milligrams of gold, nine hundred thousandths fine.

This definition shall not apply to international payments which, prior to the promulgation of the present law, may have been validly stipulated in gold francs.

For the future, this law replaces previous legislation; the forced currency régime having been abrogated, no obstacle resulting from this régime will any longer exist, and the reduction of the metallic value of the franc, as newly defined, to about one-fifth of its original value, will not affect the payments involved by the Serbian loans at issue which are undoubtedly international payments.

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In formulating, in the operative part of the judgment, the result arrived at by it in regard to the question referred to it, the Court has held that it must keep as closely as possible to the terms used by the Parties themselves in the Special Agreement. The reason why the Court has omitted the formula which, in Article I, paragraph (*b*), of the Special Agreement sets out in general terms the contention of the French bondholders, is that the submissions of the French Case and Counter-Case do not repeat this formula; moreover, it does not appear to contain anything which is not subsequently expressed with greater clearness in paragraphs 1 and 2 of the same article and which is not reproduced in the French Government's submissions.

Again, the Court considers that it should be clearly stated that, if payment is to be made in gold francs, this is to be understood in accordance with the interpretation given above, that is to say that if the franc which is legal tender at the place fixed for payment does not possess the value of the gold franc as defined by this judgment, payment must be effected by the remittance of a number of francs, the value of which corresponds to the value of the gold francs due.

FOR THESE REASONS,

The Court,
having heard both Parties,
by nine votes to three,
gives judgment to the following effect:

(1) That, in regard to the Serbian 4% loan of 1895, the holders of bonds of this loan are entitled, whatever their nationality may be, to obtain, at their free choice, payment of the nominal amount of their coupons due for payment but not paid and of those subsequently falling due, as also of their bonds drawn for redemption but not refunded and of those subsequently drawn, at Paris, Berlin, Vienna and Belgrade, in the currency in circulation at one of these places;

(2) That, in regard to the 4% 1895, 5% 1902, 4½% 1906, 4½% 1909 and 5% 1913 Serbian loans, the holders of these bonds are entitled to obtain payment of the nominal amount of their coupons due for payment but not paid and of those subsequently falling due, as also of their bonds drawn for redemption but not refunded and those subsequently drawn, in gold francs, in the case of the 1895 loan, at Belgrade and Paris, and, in the case of the 1902, 1906, 1909 and 1913 loans, at Belgrade, Paris, Brussels and Geneva, or at the equivalent value of the said amount at the exchange rate of the day in the local currency at Berlin and Vienna, in the case of the 1913 loan, and at Berlin, Vienna and Amsterdam, in the case of the 1902, 1906 and 1909 loans.

(3) That the value of the gold franc shall be fixed between the Parties, for the above-mentioned payments, as equivalent to that of a weight of gold corresponding to the twentieth part of a piece of gold weighing 6 grammes 45161, 900/1000 fine. . . .¹

§ 79. MOB VIOLENCE: THE BREMEN INCIDENT

The documents concerning the demonstration against the swastika flag on board the *S.S. Bremen* do not show a case in which each government is pressing its rights to the utmost extent and are hence not completely satisfactory as an illustration of the principles governing the protection to be afforded against mob violence, the more especially since what was attacked was not the person of a foreigner, but the "national emblem." Nevertheless, the attitude of the American government as to what it was necessary to show in order to establish fulfillment of its responsibility towards Germany throws some light on these principles, and the documents have unusual current interest.

¹ See also *Feist v. Société Intercommunale Belge d'Electricité* (1934) A. C. 161; *International Trustee, . . . v. The King*, 53 Times L. R. 64; *Perry v. U. S.*, 294 U. S. 330; *Norman v. B. & O. R. R.*, 294 U. S. 240.—Ed.

When the apprehended persons were brought before Magistrate Brodsky all but one of them were set free, and the Magistrate made a very uncomplimentary speech about the Nazi Government of Germany, saying that in the eyes of many the swastika emblem resembled a pirate flag. The German Ambassador protested in terms which were not made public. The reply made by the Secretary of State is reprinted as (b); it illustrates in a small way the difficulties which arise from the fact that while the United States is responsible to foreign States for injuries to their nationals arising from mob violence, the peculiar nature of our federal system does not permit the national government to control the remarks of officials of State and municipal governments, or to remove or discipline such officials when they offend foreign States. (Compare § 74, Art. 3.)

a. Incident of July 29, 1935

United States Department of State, *Press Releases*, August 3, 1935, p. 100.

Following are the texts of notes exchanged between the Chargé d'Affaires of Germany, Mr. Rudolf Leitner, and the Acting Secretary of State, Mr. William Phillips, regarding the flag incident aboard the *S.S. Bremen*:

GERMAN EMBASSY

Washington, *July 29, 1935*

MR. UNDER SECRETARY OF STATE:

By direction of my Government, I have the honor to advise Your Excellency of the following:

Late in the evening of July 26, shortly before the departure of the German steamship *Bremen* from New York harbor, the German flag flying from the bow of the steamship was violently torn off by demonstrators. I am instructed to make the most emphatic protest against this serious insult to the German national emblem, and I venture to express the expectation that everything will be done on the part of the American authorities charged with the prosecution of criminal offenses in order that the guilty persons may be duly punished.

Accept [etc.].

LEITNER

The Honorable the Acting Secretary of State

MR. WILLIAM PHILLIPS

Washington, D. C.

August 1, 1935.

SIR:

I have received your note of July 29, 1935, in which, upon instructions from your Government, you lodge a protest against the action of demonstrators in New York in tearing down the German flag from the bow of

the German steamship *Bremen* when that vessel was departing from New York the night of July 26, 1935. You also give expression to the hope that everything will be done by the appropriate American authorities in order that the guilty persons may be punished.

The appropriate authorities in New York have provided me with a full report on this matter, and I enclose a copy for your information. You will note that the police authorities took most extensive precautions in order to prevent any untoward incident; that having learned in advance that a demonstration was planned, they consulted with the representatives of the interested steamship companies and in co-operation with them took all measures which seemed calculated to assure order; and that the incident which actually occurred was in no sense due to neglect on the part of the American authorities.

I invite particular attention to those sections of the report which indicate that a very considerable number of police were detailed to prevent disturbances; that the police suggested measures to prevent persons other than the passengers and other duly authorized visitors from boarding the vessel but that the officers of the steamship line did not deem it necessary to adopt such measures; that unauthorized persons accordingly succeeded in boarding the steamer; that before the vessel sailed such elements started a demonstration; that police authorities took immediate and efficient action with a view to clearing the ship of all unauthorized persons; and that during the course of this action one of the police, namely, Detective Matthew Solomon, in attempting to apprehend the ringleaders, was set upon, knocked down, and sustained serious injury.

I also invite attention to that section of the enclosed report which indicates that the persons implicated in this disorder have been apprehended and are being held for trial.

It is unfortunate that, in spite of the sincere efforts of the police to prevent any disorder whatever, the German national emblem should, during the disturbance which took place, not have received that respect to which it is entitled.

Accept [etc.].

WILLIAM PHILLIPS

Enclosures [are omitted].

Report of the New York Police Department, July 29, 1935;

Copy of circular.

HERR RUDOLF LEITNER

Chargé d'Affaires ad interim of Germany

b. The Brodsky Incident

United States Department of State, *Press Releases*, September 14, 1935, pp. 196-197.

STATEMENT BY THE SECRETARY OF STATE

Regarding the recent protest of the German Ambassador in connection with the decision of a case upon a complaint against certain persons accused of participating in the removal of the German flag from the bow of the *S. S. Bremen* on July 26 last, the Secretary of State has made the following oral statement to the representative of the German Government:

"It appears that those accused were charged with the violation of the penal law of New York, prohibiting unlawful assemblies.

"The magistrate reached the conclusion, upon the correctness of which the Department cannot undertake to pass, that the evidence submitted did not support the charge of unlawful assembly, and dismissed the complaint and discharged the defendants on this charge.

"The complaint of the German Government is specifically directed at the statements made by the magistrate in rendering his decision, which that Government interprets as an unwarranted reflection upon it.

"The Department is constrained to feel that the magistrate, in restating contentions of the defendants in the case and in commenting upon the incident, unfortunately so worded his opinion as to give the reasonable and definite impression that he was going out of his way adversely to criticize the German Government, which criticism was not a relevant or legitimate part of his judicial decision.

"I may explain that State and municipal officials are not instrumentalities of the Federal Government. Although in this country the right of freedom of speech is well recognized by our fundamental law, it is to be regretted that an official having no responsibility for maintaining relations between the United States and other countries should, regardless of what he may personally think of the laws and policies of other governments, thus indulge in expressions offensive to another government with which we have official relations."

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QUESTIONS AND PROBLEMS

Students are urged to read all the materials in the chapter before attempting to answer the questions and problems.

1. When is a State responsible for injury done to an alien? Who owes this responsibility? To whom is it owed? What is the role of the injured alien in such a situation?

2. Under the principles of the Harvard Draft Convention (§ 74), would the United States be entitled to support as against Italy the claims of the following persons?

(a) Mr. A, a national of Italy who suffered denial of justice in Italy, but subsequently became an American citizen.

Would it make any difference if Mr. A on becoming an American citizen, had not lost his Italian nationality?

(b) Mr. B, an American citizen who suffered denial of justice in Italy in 1915 and who complained to the American State Department then, but who in 1918 sold his claim to his brother and in 1923 bought it back?

(c) Mr. C, an American citizen who suffered denial of justice in Italy in 1915 and subsequently became a Portuguese national in 1920. The claim is first brought to the attention of the Department of State in 1929.

(d) The D Corporation, incorporated under the laws of Delaware with officers who are American citizens, but with 60 per cent of the voting stock owned by British subjects. The D Corporation had its concession to develop water power canceled by the Italian Government without notice and contrary to the terms of the concession.

Would it make any difference if 60 per cent of the voting stock were held by American citizens? Could the Department of State support the claims of the other 40 per cent in that case?

(e) Mr. E is an American citizen who buys land in Italy. Italian law provides that all owners of land in Italy acquire Italian nationality by virtue of their landholding. Mr. E gets into trouble with members of the Fascist militia and asks the American Government to protect him as an American citizen.

3. Why is the title of the award in § 76 *United States (B. E. Chattin) v. United Mexican States*? To whom is the award made? Why? What are the facts in this case? What is the nature of the General Claims Commission which decided it? How is the jurisdiction of such commissions determined? What was the decision of the Commission? What were the principal reasons for this decision?

Why did Mexico allege that Chattin was a fugitive from justice? What did Mexico claim was the effect of this? What did the Commission think on this point? Do you agree?

Did the Commission think that arrest on a mere oral order constituted a denial of justice?

What is the Commission's distinction between direct and indirect governmental responsibility? Do you think this distinction is a good one? Did the Commission think that denial of justice existed in every case where either indirect or direct governmental responsibility could be shown? Explain. In the judgment of the Commission did the facts presented in the case of Chattin present a situation of direct or indirect governmental responsibility? Why? Did the Commission think these facts indicated a denial of justice? Is the Commission's award based on denial of justice (as it conceives that term) or on the direct responsibility of Mexico for the acts of its judiciary? What standards would be applied in each of these cases? What standards does the Commission apply in this instance?

What facts did the United States contend showed that Chattin's trial had been held in an illegal manner? Did the alleged influence of the Governor have much influence on the Commission? The alleged delay in the proceedings? The alleged exorbitant bail? The alleged lack of counsel? The alleged lack of confrontation? The alleged severity of the sentences? The alleged brevity of the court's proceedings? Do you think any one of these factors alone produced the Commission's award?

What do you think of the Commission's proceedings in this case as a whole? Do you think its attitude was judicial and reasonable, or that it was "picking on" Mexico?

4. Why is the title of the award in § 77 *United States (North American Dredging Co.) v. United Mexican States*? What are the facts in the case? What is the award of the Commission? Is the award the same as a rejection of the claim of the United States, or is there a difference? Explain.

What is a "Calvo clause"? In this case, who were the parties to the "Calvo clause," and how extensive were its terms? Judging from the remarks of the Commission, how did the Mexican Government interpret this clause? Did the Commission agree with this interpretation? How did the American Government interpret it? Did the Commission agree with this interpretation? What exactly was the position of the Commission?

Had the North American Dredging Company made any attempt to live up to its agreement under this clause? Explain. Do you think that if the Company had resorted to the Mexican courts the attitude of the Commission would have been different? Explain. Do you think that if the Company had exhausted its Mexican remedies, the "Calvo clause" bound it not to apply to the United States for relief? What did the Commission think on this point?

What was the jurisdiction of the Commission in this case? How was it established? What was provided in Article V of the Treaty? Do you think the decision of the Commission was in accord with this provision? Explain. Did the fact that the United States had espoused the claim preclude the Commission from determining on its own account whether the United States was entitled to espouse it? What effect did the attitude of the Commission on this point have on the attitude it was able to take towards the provisions of Article V of the Treaty? Do you think that this was legitimate, or do you think that the Commission was attempting to circumvent the provisions of Article V?

Did the decision of the Commission mean that the North American Dredging Company had no redress? Explain.

Why do States insert "Calvo clauses" in their contracts? Is there any principle of international law with respect to such contracts? State as accurately and completely as you can what the result of this case seems to be on this point.

Does the case shed any light on the question of whether individuals or corporations as such have standing in international law, apart from the States presenting their claims?

5. What were the facts in the *Case Concerning the Payment of Various Serbian Loans Issued in France* (§ 78)? How did this case come before the Permanent Court of International Justice? What were the precise issues before the Court? How were they decided?

Who were the contracting parties to the various Serbian loans considered by the Court? What, in general, were the terms of these loans? How could such a state of things produce a case between two States calling for the application of international law?

Why was it necessary for the Court to consider the meaning of the term "gold francs"? What were the Serbian contentions respecting the meaning of this term? In the opinion of the Court, did the term have an international meaning? How did the Court support its opinion on this point? Had the meaning of the term changed in domestic transactions in France? What importance did

this point have? Did the Court think this changed the obligation stated in the bonds? Explain. Did acceptance by the bondholders of depreciated paper francs for a period alter their rights? Explain the two points of view from which the Court discussed this question, and its conclusions.

Was it legal in France at all times for payments to be made in gold specie? Did this, in the opinion of the Court, release the Serb-Croat-Slovene State from payment of a full equivalent? How would a full equivalent be calculated: i. e., in practice, how could the payments required be made?

Why did the Court find it necessary to discuss Serbian law and French law? What was the role of Serbian law in the case? What was the role of French law? What kinds of materials did the Court examine in order to arrive at its conclusions concerning French law? Do you think the Court was bound to accept the contentions of the French Government as to what were the contents of French law, or could it have found adversely to the contentions of the French Government on this point? Explain. What did the Court do?

Do you think the Serbian Government had a just case? Discuss.

6. Do you think the judgment of the Permanent Court of International Justice in the case of the *Serbian Loans* (§ 78) has any significance for the United States in view of monetary policies of the United States since 1933? Explain. If it is available, read the judgment of the United States Supreme Court in *Perry v. United States*, (1935) 294 U. S. 330 with this question in mind: Under the decision of the Permanent Court of International Justice, could the Mexican Government present to an international tribunal the claims of Mexican nationals who had bought American gold bonds, and obtain payment in gold dollars of the value legally existing at the time the bonds were issued? Does the decision in the *Perry* case prevent this? What do you think of the result?

7. A Communist party obtains total control in State X and persecutes Catholics and Fascists. It also replaces the regular board of directors of the Mercur Steamship Lines, an X corporation, with political appointees. The *Loki*, one of the Mercur ships, docks subsequently in New York City flying the black cross flag of the State X Communist party, which State X has ordered to be flown at all times by State X vessels. At the dock a mob of Catholics and anti-Communists overwhelms the customary police detail, throws the flag into the harbor, injures seven members of the *Loki's* crew and destroys \$50,000 worth of property belonging to the ship and the passengers.

State X demands of the United States:

- (a) an apology
- (b) an official salute to the black cross flag
- (c) compensation for injuries suffered by the members of the crew
- (d) compensation for property destroyed.

The United States rejects these and by agreement the matter is submitted to arbitration for award according to the principles of international law.

Give decision and reasons.

8. Mrs. R is denied a license as a *masseuse* by the City of New York. A national of Germany, she claims that a treaty between the United States and Germany guarantees the nationals of each residing in the territory of the other the right to enter all the ordinary occupations on the same terms as the nationals of the other. A municipal ordinance of New York City forbids the granting of licenses to act as *masseuse* to all who are not American citizens. What deter-

mines the rights of Mrs. R? Suppose that Mrs. R appeals to the Supreme Court of the United States, and the Supreme Court decides against her. Under the Draft Convention (§ 74), has Mrs. R any further recourse? Explain. In this situation, who owes an obligation to whom? Why? What rules govern this obligation? What methods exist for determining in such a case the content of the obligation?

9. Mr. H invests in bonds of the State of Mississippi, the interest and principal of which Mississippi later refuses to pay. Mr. H being a citizen of France, France requests the United States to see that Mr. H is paid. The United States replies that under its Constitution it is not liable for the debts of Mississippi, and that there is no constitutional method of compelling Mississippi to pay Mr. H. Under the Harvard Draft Convention (§ 74), what are the rights of the parties? See *Monaco v. Mississippi* (1934) 292 U. S. 313.

10. Mr. W, a citizen of Puerto Rico, obtains a mining concession from the Syrian Government. After he has spent several million dollars in development work in Syria, the Syrian Government cancels the concession. To what Governments should Mr. W apply for redress? In what order? Why?

11. Mr. S, a British subject, negotiated (on behalf of British and American capitalists) an elaborate development concession with the Emperor of Ethiopia. The British Government subsequently advised the Emperor not to grant the concession, stating that it was contrary to the terms of the Agreement of 1906 (See § 20). The Emperor replied that he was not bound by the Agreement of 1906. Was he right? Would the British Government be within its rights if it announced that it would not protect its subjects in any controversy over the rights they acquired under the concession? Discuss.

12. Suppose that State X should enact a law that no non-Aryan might maintain suit in State X courts. Mr. Q, an American citizen of Jewish race interested in an import business in New York City, finds that a contract for the sale of amber, signed with a State X firm in State X, is broken by the firm. The State X courts refuse to entertain his suit. How could the Draft Convention (§ 74) be applied in this situation?

Suppose further that State X set up special non-Aryan courts having charge of all cases to which Jews were parties. Would there be any change in the way the principles of the Draft Convention would be applied?

Could State X claim that, as under its law non-Aryans were not "nationals," the principle of Article 5 of the Draft Convention did not apply?

13. Suppose that no special legislation relating to the position of non-Aryans before the courts had been enacted in State X, that Mr. Q's contract was broken by the firm as in question 12, and that Mr. Q immediately requests the American Department of State to make representations to State X on his behalf. Assuming the Harvard Draft Convention to be in effect, what reply should the Department of State make to Mr. Q? Give your reasons.

Would it make any difference if Mr. Q alleged in his request that it was useless for Jews to resort to the State X courts because the administration of justice in those courts was such as to make it impossible for a Jew to secure a verdict? Explain your answer.

14. In the absence of any legislation empowering him to do so, the President of the United States orders an army captain not to honor a writ of *habeas*

corpus issued by a Federal District Court in the case of a person held by the military authorities as a spy of State X. What provision of the Draft Convention (§ 74) would apply? Discuss. Could State X protest?

Suppose Congress had authorized the President to act as he did, but that the person held was innocent. Does the innocence of the person alone result in responsibility attaching to the United States under the Draft Convention? Discuss. Would State X be justified in making a protest and claiming release of the prisoner after the military authorities had refused to honor the writ of *habeas corpus*? Would State X be justified in such action before this fact?

15. The postmaster of Metropole, Nevada, unlawfully withholds from Mr. J a Russian national who calls for it at the General Delivery office, a letter offering Mr. J a lucrative position. As a result the position is given to another. Mr. J sues in the courts and is awarded damages of one dollar. Under the Draft Convention (§ 74), would Russia have any grounds for a protest? Discuss. Would the situation be any different if the postmaster were dismissed?

16. The United States issues bonds in 1917, ten thousand dollars' worth being bought by Mr. F, a citizen of France. The bond read, in part, "The principal and interest hereof are payable in United States gold coin of the present standard of value." At the time the bond was issued, a dollar was defined by law as 25.8 grains of gold .9 fine. Subsequently Congress defined the dollar as 15 5/21 grains of gold .9 fine. Mr. F demands payment on the due date in dollars of the old gold value; the Treasury refuses, but offers to pay in dollars of the new gold value. Mr. F sues in the United States courts for damages, but ultimately the Supreme Court decides that, although Congress had no legal authority to alter the value of its bonds, Mr. F had suffered no damage. Mr. F then presents his claim to the French Government. How would the principles of the Harvard Draft Convention apply to this case? How would it be decided if it were submitted to the Permanent Court of International Justice?

Now suppose that the United States enacted legislation whose effect was to prevent any suits arising from such claims as Mr. F's from being brought in the courts. How would the principles of the Draft Convention apply in such a case? How do you think it would be decided if it were submitted to the Permanent Court of International Justice?

17. In which of the following cases is there a denial of justice? Mr. X is a citizen of Utopia, and the following acts occur in Ruritania, where Mr. X is living.

(a) A captain in the Ruritanian army accidentally wounds Mr. X while shooting at clay pigeons.

(b) Mr. X is convicted of arson and sentenced to five years' imprisonment without having heard what were the charges against him.

(c) Mr. X hears that a Ruritanian mob is pillaging the homes of all Utopians, and that it is a mile away headed in the direction of his residence. He telephones the local police immediately, and one hour later a single gendarme arrives armed with a billy. In another hour the mob arrives, overwhelms Mr. X and the gendarme, and wrecks the interior of Mr. X's house. Mr. X spends six weeks in the hospital as a result of his injuries.

(d) The Parliament of Ruritania enacts that the incomes of foreigners shall be taxed at twice the rates imposed on Ruritaniens, and the Ruritanian courts uphold the application of this law to Mr. X when he contests it.

(e) Mr. X is charged with housebreaking. There is some evidence of his guilt and a great deal of evidence supporting an alibi, but the Ruritanian courts find Mr. X guilty and sentence him to imprisonment at hard labor for 35 years.

(f) Mr. X sues Mr. Y, a citizen of Ruritania, for breach of contract. In the court of first instance Mr. X wins, but the Ruritanian Supreme Court reverses this judgment.

(g) A Ruritanian statute forbids foreigners to consult lawyers, as a result of which Mr. X loses a case involving five dollars.

18. (a) Mr. Salt is an American citizen who owns a valuable railway in the Northeast Province of Graustark. A revolt breaks out in which the revolting New Deal party obtains control of the Northeast Province. The Graustarkian Government, continuing to be the only one recognized by the United States, does not respond to Mr. Salt's appeals to protect his property. What are Mr. Salt's rights? Discuss.

(b) The New Deal party is successful in overthrowing the Government and establishing its control throughout Graustark's territory, but is not recognized by the United States. What are Mr. Salt's rights? Discuss. What would his rights be if recognition were extended by the United States? Discuss.

(c) Suppose that the revolt is overthrown but that Mr. Salt's railway is ruined in the meantime. What are Mr. Salt's rights? Would it make any difference if the United States had recognized the New Deal party as the Government of Northeast Province? Discuss.

IX

State Agents, Diplomatic and Consular

A. Diplomatic Agents

§ 80. GENERAL: AMERICAN CONVENTION ON DIPLOMATIC OFFICERS

The convention here printed is the most widely adopted international instrument dealing generally with diplomatic officers and gives a general preliminary view of the role and functions of such officers.

Convention on Diplomatic Officers, Adopted at Havana, February 20, 1928¹

*Report of the Delegates of the United States of America to the
Sixth International Conference of American States, pp. 203-209.*

The Governments of the Republics represented at the Sixth International Conference of American States, held in the city of Habana, Republic of Cuba, the year 1928, being aware that one of the most important matters in the field of international relations is that pertaining to the rights and duties of diplomatic officers, which should be regulated in accordance with the conditions of economic, political and international life of nations;

Realizing the desirability that such regulation be effected pursuant to the new trends on the matter;

Recognizing that diplomatic officers do not in any case represent the person of the chief of state but only their government and that they must be accredited to a recognized government, and

¹ In August, 1939, this convention was in force between the following States: Brazil, Chile (with reservations), Colombia, Costa Rica, Cuba, Dominican Republic (with reservations), Ecuador, Mexico, Nicaragua, Panama, Venezuela, and Uruguay. The United States signed the Convention but did not ratify, as was the case with most of the other Central and South American States. Non-American States did not sign, ratify, or adhere to the Convention.

Acknowledging the fact that diplomatic officers represent their respective states and should not claim immunities which are not essential to the discharge of their official duties, and acknowledging also that it would seem desirable that either the officer himself or the state represented by him renounce diplomatic immunity whenever touching upon a civil action entirely alien to the fulfilment of his mission;

There being no possibility, nevertheless, at the present moment, of agreeing to general stipulations which although formulating a well-defined trend in international relations sometimes conflict with the established practices of various states in a contrary sense;

Therefore and until a more complete regulation of the rights and duties of diplomatic officers can be formulated;

Have decided to conclude a convention incorporating the principles generally accepted by all nations, and have designated the following Plenipotentiaries: [Here follows the list of Plenipotentiaries.]

Who, after having deposited their full powers, found to be in good and due form, have agreed on the following provisions:

GENERAL PROVISION

ARTICLE 1. States have the right of being represented before each other through diplomatic officers.²

SECTION I. *Chiefs of mission*

ARTICLE 2. Diplomatic officers are classed as ordinary and extraordinary.

Those who permanently represent the government of one state before that of another are ordinary.

Those entrusted with a special mission or those who are accredited to represent the government in international conferences and congresses or other international bodies are extraordinary.

ARTICLE 3. Except as concerns precedence and etiquette, diplomatic officers, whatever their category, have the same rights, prerogatives and immunities.

Etiquette depends upon diplomatic usages in general as well as upon the laws and regulations of the country to which the officers are accredited.

² "An examination of the text-writers reveals that there is substantial agreement that the right of legation constitutes merely a capacity or aptitude to enter into diplomatic relations, and that there exists no veritable legal right or obligation to do so. . . . Although no positive right of legation exists in customary international law, it has occasionally been established as a conventional right by treaty." The Havana Convention is cited as an example. Introductory Comment, Harvard Law School Research in International Law, "Draft Convention on Diplomatic Privileges and Immunities," 26 *A.J.I.L. (Supp., April, 1932)*, 31-32. The Draft Convention itself contained no provision on the "so-called 'right of legation,'" since it "would involve a consideration of political factors not susceptible of legal formulation."—Ed.

ARTICLE 4. In addition to the functions indicated in their credentials, ordinary officers possess the attributes which the laws and decrees of the respective countries may confer upon them. They should exercise their attributes without coming into conflict with the laws of the country to which they are accredited.

ARTICLE 5. Every State may entrust its representation before one or more governments to a single diplomatic officer.

Several states may entrust their representation before another to a single diplomatic officer.

ARTICLE 6. Diplomatic officers, duly authorized by their governments, may, with the consent of the local government, and upon the request of a state not represented by an ordinary officer before the latter government, undertake the temporary or accidental protection of the interests of the said state.

ARTICLE 7. States are free in the selection of their diplomatic officers; but they may not invest with such functions the nationals of a state in which the mission must function, without its consent.

ARTICLE 8. No state may accredit its diplomatic officers to other states without previous agreement with the latter.

States may decline to receive an officer from another or, having already accepted him, may request his recall without being obliged to state the reasons for such a decision.³

ARTICLE 9. Extraordinary diplomatic officers enjoy the same prerogatives and immunities as ordinary ones.

SECTION II. *Personnel of missions*

ARTICLE 10. Each mission shall have the personnel determined by its government.

ARTICLE 11. When diplomatic officers are absent from the place where they exercise their functions or find it impossible to discharge them, they shall be substituted for temporarily, by persons designated for that purpose by their government.

³ Article 9 of the Harvard Draft Convention provides:

"1. A sending state may send any person as a chief of mission, subject to *agr  ation*:

"(a) Before appointing a person to be a chief of mission, a sending state shall make inquiry of the receiving state as to the acceptability of the person whose appointment is contemplated.

"(b) When such inquiry has been made, the receiving state shall indicate, without obligation to communicate reasons, whether or not such person is acceptable.

"(c) A sending state shall not appoint a person as chief of mission if the receiving state has indicated that such person is not acceptable.

"2. The preceding paragraph of this article shall not apply to the sending of a person to be the chief of a special mission."—Ed.

SECTION III. *Duties of diplomatic officers*

ARTICLE 12. Foreign diplomatic officers may not participate in the domestic or foreign politics of the state in which they exercise their functions.

ARTICLE 13. Diplomatic officers shall, in their official communications, address themselves to the minister of foreign relations or secretary of state of the country to which they are accredited. Communications to other authorities shall also be made through the said minister or secretary.

SECTION IV. *Immunities and prerogatives of diplomatic officers*

ARTICLE 14. Diplomatic officers^{*} shall be inviolate as to their persons, their residence, private or official, and their property. This inviolability covers:

- a) All classes of diplomatic officers;
- b) The entire official personnel of the diplomatic mission;
- c) The members of the respective families living under the same roof;
- d) The papers, archives and correspondence of the mission.

ARTICLE 15. States should extend to diplomatic officers every facility for the exercise of their functions and especially to the end that they may freely communicate with their governments.

ARTICLE 16. No judicial or administrative functionary or official of the state to which the diplomatic officer is accredited may enter the domicile of the latter, or of the mission, without his consent.

ARTICLE 17. Diplomatic officers are obliged to deliver to the competent local authority that requests it any person accused or condemned for ordinary crimes, who may have taken refuge in the mission.

ARTICLE 18. Diplomatic officers shall be exempt in the state to which they are accredited:

1. From all personal taxes, either national or local;
2. From all land taxes on the building of the mission, when it belongs to the respective government;
3. From customs duties on articles intended for the official use of the mission, or for the personal use of the diplomatic officer or of his family.

^{*}The question whether functionaries of international organizations enjoy diplomatic immunity has usually been determined by special agreement. Article 7, paragraph 4 of the League of Nations Covenant, provides that "Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities"; thus in the case of administrative officials of the League granting immunities to persons who do not represent any State, but the League itself. Likewise, though Judges of the Permanent Court of International Justice do not as Judges represent any single State, Article 19 of the Court's Statute provides that they shall "enjoy diplomatic privileges and immunities" when engaged on the business of the Court. Similar immunities were granted functionaries of the Court by agreement between the Court and the Dutch Government; which immunities, however, were limited in the case of members of the Court's Registry who were Dutch nationals. On the whole problem, see L. Preuss, "Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest," 25 *A.J.I.L.* (1931), 694.—Ed.

ARTICLE 19. Diplomatic officers are exempt from all civil or criminal jurisdiction of the state to which they are accredited; they may not, except in the case when duly authorized by their government they waive immunity, be prosecuted or tried unless it be by the courts of their own country.

ARTICLE 20. The immunity from jurisdiction survives the tenure of office of diplomatic officers in so far as regards actions pertaining thereto; it may not, however, be invoked in respect to other actions except while discharging their diplomatic functions.

ARTICLE 21. Persons enjoying immunity from jurisdiction may refuse to appear as witnesses before the territorial courts.

ARTICLE 22. Diplomatic officers enter upon the enjoyment of their immunity from the moment they pass the frontier of the state where they are going to serve and make known their position.

The immunities shall continue during the period that the mission may be suspended, and, even after it shall be terminated, for the time necessary for the officer to be able to withdraw with the mission.

ARTICLE 23. Persons belonging to the mission shall also enjoy the same immunities and prerogatives in the states which they cross to arrive at their post or to return to their own country, or in a state where they may casually be during the exercise of their functions and to whose government they have made known their position.

ARTICLE 24. In case of death of the diplomatic officer, his family shall continue to enjoy the immunities for a reasonable term, until they may leave the state.⁵

⁵ The Harvard Draft Convention provides:

"Section V. Personal Privileges and Immunities

"ARTICLE 16. Beginning of Immunities. A receiving state shall accord to a member of a mission, to a member of his family, and to a member of the administrative personnel the privileges and immunities respectively provided for in this convention as from the time of such person's entry upon the territory of the receiving state, or, if the person is already within the territory of the receiving state, as from the time of his becoming such a member.

"ARTICLE 17. Personal Protection and Security. A receiving state shall protect a member of a mission and the members of his family from any interference with their security, peace, or dignity.

"ARTICLE 18. Non-Liability for Official Acts. A receiving state shall not impose liability on a person for an act done by him in the performance of his functions as a member of a mission or as a member of the administrative personnel.

"ARTICLE 19. Exemption from Jurisdiction. A receiving state shall not exercise judicial or administrative jurisdiction over a member of a mission or over a member of his family.

"ARTICLE 20. Exemption from Customs Duties. A receiving state shall exempt a member of a mission from payment of customs duties or other import or export charges upon articles intended for the official use of a mission, or for the personal use of a member of a mission or of his family.

"ARTICLE 21. Prohibited Goods. A receiving state may refuse to permit a member of a mission, a member of his family, or a member of the administrative or service personnel, to

SECTION V. *Termination of the diplomatic mission*

ARTICLE 25. The mission of the diplomatic officer ends:

1. By the official notification of the officer's government to the other government that the officer has terminated his functions;
2. By the expiration of the period fixed for the completion of the mission;
3. By the solution of the matter, if the mission had been created for a particular question;
4. By the delivery of passports to the officer by the government to which he is accredited;
5. By the request for his passports made by the diplomatic officer to the government to which he is accredited.

In the above-mentioned cases, a reasonable period shall be given the diplomatic officer, the official personnel of the mission, and their respective families, to quit the territory of the state; and it shall be the duty of the

bring into its territory articles the importation of which is prohibited by its general laws; or to take out of its territory articles the exportation of which is prohibited by its general laws.

"ARTICLE 22. Exemption from Taxation. A receiving state shall not impose any taxes, whether national or local,

- (a) upon the person of a member of a mission or of a member of his family;
- (b) upon the salary of a member of a mission, or of a member of the administrative or service personnel, paid by the sending state;
- (c) upon the income, derived from sources outside the receiving state, of a member of a mission, or of a member of his family, or of a member of the administrative or service personnel not a national of the receiving state;
- (d) upon tangible movable property of a member of a mission unless used or employed in a business or profession, other than that of the mission, engaged in or practiced within the territory of the receiving state;

(e) upon the interest of a member of a mission in immovable property used as his residence or for the purposes of the mission; provided that such exemption need not be extended to charges for special services or to assessments for local improvements.

"ARTICLE 23. Administrative and Service Personnel. Subject to the provisions of this convention, a receiving state may exercise jurisdiction over any member of the administrative or service personnel of a mission, only to an extent and in such a manner as to avoid undue interference with the conduct of the business of the mission.

"ARTICLE 24. Engaging in Business or Profession. 1. A receiving state may refuse to permit a member of a mission or a member of his family to engage in a business or to practice a profession within its territory, other than that of the mission, or to waive in behalf of such a person any of its requirements for engaging in a business or practicing a profession.

"2. A receiving state may refuse to accord the privileges and immunities provided for in this convention to a member of a mission or to a member of his family who engages in a business or who practices a profession within its territory, other than that of the mission, with respect to acts done in connection with that other business or profession.

"ARTICLE 25. Submission to Jurisdiction. When a member of a mission or a member of his family institutes a proceeding in a court of the receiving state, the receiving state may exercise jurisdiction over such person for the purposes of that proceeding; in the absence of a renunciation or waiver of the immunity from execution, however, no execution may issue in consequence of that proceeding against him or against his property.

"ARTICLE 26. Renunciation of Privileges and Immunities. A sending state may renounce or waive any of the privileges or immunities provided for in this convention: the renunciation or waiver may be made only by the government of the sending state if it concerns the privileges or immunities of the chief of mission; in other cases, the renunciation or waiver may be made either by the government of the sending state or by the chief of mission."

government to which the officer was accredited to see that during this time none of them is molested nor injured in his person or property.

Neither the death or resignation of the head of the state nor the change of government or political régime of either of the two countries shall terminate the mission of the diplomatic officers.

ARTICLE 26. The present convention does not affect obligations previously undertaken by the contracting parties through international agreements.

ARTICLE 27. [Provides for ratification; omitted.]

[The signatures, etc., are omitted.]

§ 81. INSTRUCTIONS TO AMERICAN DIPLOMATIC OFFICERS

Instructions to Diplomatic Officers of the United States, from which these sections are reprinted, is an official publication of the Department of State, issued to diplomatic officers. In its statement of the rights and duties of American diplomatic officers abroad, the *Instructions* may be taken as an official interpretation of the American conception of these rights and duties under international law.

Special attention is invited to Section II-2, Rules of Congress of Vienna and Congress of Aix-la-Chapelle. This classification is still the basic classification of diplomatic officers; but it should be compared on the one hand with the classification in Section II-1, Grades of diplomatic representatives, and on the other with the classification in the Convention on Diplomatic Officers adopted at Havana in 1928, § 80 above.

Instructions to Diplomatic Officers of the United States, March 8, 1927

Text from the reprint in Feller and Hudson, *Diplomatic and Consular Laws and Regulations*, II, 1253-1279.

CHAPTER I

THE DIPLOMATIC BRANCH OF THE FOREIGN SERVICE AND THE DEPARTMENT OF STATE

I-1. *Definitions*.—Throughout these instructions the term “diplomatic officer” shall be deemed to include ambassadors, ministers (whether plenipotentiary or resident), diplomatic agents, *chargés d'affaires*, *chargés d'affaires ad interim*, counselors of embassy or legation, and secretaries of embassy or legation.

The term “diplomatic representative” shall be deemed to denote chiefs of mission only.

I-2. [*Oath of office*.]

I-3. *Functions of diplomatic officers*.—Diplomatic officers have, within the countries to which they are accredited, four major functions to perform:

(a) To establish and maintain friendly relations between the Govern-

ment and people of the United States and the Government and people of that country.

(b) To keep the American Government promptly and accurately informed regarding political and economic developments abroad affecting its interests.

(c) To extend protection to American citizens and to promote just American interests in every proper manner.

(d) To interpret faithfully the viewpoint of the American Government in any questions at issue.

I-4. *Diplomatic and consular branches of the Foreign Service.*—Diplomatic officers of the United States are accredited to foreign governments, whereas consular officers are accredited to municipalities and districts. Diplomatic officers, therefore, have to deal with the officers of the governments to which they are accredited; consular officers, with the municipal and district officers of the countries in which they are resident.

I-5. *Relation of diplomatic officers to the Department of State.*—Upon the harmonious interrelation between the Department of State and the Foreign Service (both diplomatic and consular branches) depends in large measure the effective functioning of American foreign relations. A policy is usually initiated, and must in all cases be sanctioned, by the Department of State; its execution is frequently left to diplomatic officers, who owe implicit and immediate obedience to the Department's instructions. . . .

CHAPTER II

DIPLOMATIC REPRESENTATIVES

II-1. *Grade of diplomatic representatives.*—The diplomatic representatives of the United States are as follows:

(a) Ambassadors extraordinary and plenipotentiary and special commissioners with the rank of ambassadors extraordinary and plenipotentiary.

(b) Envoys extraordinary and ministers plenipotentiary and special commissioners, with the rank of envoys extraordinary and ministers plenipotentiary.

(c) Ministers resident.

These grades of representatives are accredited by the President.

(d) *Chargés d'affaires* commissioned by the President as such and accredited by the Secretary of State to the Minister for Foreign Affairs of the government to which they are sent.

In the absence from the country to which he is accredited, or in the event of the death or disability of the chief of mission, the counselor or ranking diplomatic secretary, as the case may be, acts *ex officio* as *chargé d'affaires ad interim* without special instructions or credentials to that end.

If there should be no counselor or diplomatic secretary at the mission the Secretary of State may designate any competent person to act *ad interim*, in which case he is specifically accredited by letter to the Minister for Foreign Affairs.

When the office of consul general is added to that of envoy extraordinary and minister plenipotentiary, minister resident, chargé d'affaires, or secretary of embassy or legation, the diplomatic rank is regarded as superior to and independent of the consular rank. The officer will follow the consular regulations in one capacity separate from correspondence in the other.

II-2. *Rules of Congress of Vienna.*—For the sake of convenience and uniformity in determining the relative rank and precedence of diplomatic representatives, the Department of State has adopted and prescribed the seven rules of the Congress of Vienna, found in the protocol of the session of March 9, 1815, and the supplementary or eighth rule of the Congress of Aix-la-Chapelle of November 21, 1818. They are as follows:

In order to prevent the inconveniences which have frequently occurred, and which might again arise, from claims of precedence among different diplomatic agents, the plenipotentiaries of the powers who signed the Treaty of Paris have agreed on the following articles, and they think it their duty to invite the plenipotentiaries of other crowned heads to adopt the same regulations:

ARTICLE 1. Diplomatic agents are divided into three classes: that of ambassadors, legates, or nuncios; that of envoys, ministers, or other persons accredited to sovereigns; that of chargés d'affaires accredited to ministers for foreign affairs.

ARTICLE 2. Ambassadors, legates, or nuncios only have the representative character.

ARTICLE 3. Diplomatic agents on an extraordinary mission have not, on that account, any superiority of rank.

ARTICLE 4. Diplomatic agents shall take precedence in their respective classes according to the date of the official notification of their arrival. The present regulation shall not cause any innovation with regard to the representative of the Pope.

ARTICLE 5. A uniform mode shall be determined in each state for the reception of diplomatic agents of each class.

ARTICLE 6. Relations of consanguinity or of family alliance between courts confer no precedence on their diplomatic agents. The same rule also applies to political alliances.

ARTICLE 7. In acts or treaties between several powers which grant alternate precedence, the order which is to be observed in the signatures shall be decided by lot between the ministers.

ARTICLE 8. It is agreed that ministers resident accredited to them shall form with respect to their precedence, an intermediate class between ministers of the second class and chargés d'affaires.

II-3. *Papers furnished to the diplomatic representative.*—After filing the prescribed oath in the Department of State and receiving his commission the following papers will be furnished to a newly appointed diplomatic representative:

(a) A sealed letter of credence signed by the President and addressed to the head of the state to which the representative is sent. In the case of a commissioned chargé d'affaires or diplomatic agent, the letter of credence will be addressed by the Secretary of State to the Minister for Foreign Affairs.

(b) An open office copy of the letter of credence.

(c) Diplomatic passports for himself, his family, and suite.

(d) A copy of the *Register of the Department of State*.

(e) A copy of the *Instructions to Diplomatic Officers of the United States*, with any circular instructions modifying them.

II-4. *General and special instructions.*—The diplomatic representative will also receive such general and special instructions as the Secretary of State may deem it necessary to give him for his guidance.

II-5. [*Visit to Washington to receive instructions.*]

II-6. [*Examination of previous correspondence.*]

II-7. *Caution against public expression of views.*—A newly appointed diplomatic representative should avoid expressing his views publicly on any political subject, particularly on the eve of his departure from the United States, or when traveling through a third country.

II-8. *Notification of intended arrival.*—It is advisable for a diplomatic representative to give informal notice, preferably through the Department, to his predecessor, if the latter be at the post, or, in his absence, to the chargé d'affaires, some time before his expected arrival, in order that any usual courteous exemptions in favor of his personal effects and those of his family and suite may be extended. Formal notice of his plans and of the date of his expected arrival should also be given to the Department.

II-9. *Passage through a third country.*—Should a diplomatic representative have occasion to pass through the territory of a third state on the journey to his post, the courtesy of exemption from customs dues may be granted on being requested through the diplomatic representative of the United States in such third country; but this is a privilege, not a right.

II-10. *Presentation of credentials—Preliminaries.*—In most cases, a mission of the United States will be found already established at the seat of government. The newly arrived representative should request, through the actual incumbent of the mission, an informal conference with the Minister for Foreign Affairs, or such other officer of the government to which he is accredited as may be found authorized to act in the premises, and arrange with him for his official reception. He should at the same time, in his own

name, address a formal note to the Minister for Foreign Affairs, communicating the fact of his appointment and his rank and requesting the designation of a time and place for presenting his letter of credence.

II-11. [*Office copy of credentials.*]

II-12. [*Ceremonial address.*]

II-13. [*Presentation of letter of recall.*]

II-14. *Conformity to ceremonial usage.*—In the ceremonies on all formal occasions the diplomatic representative will be generally governed by the established usage of the country of his official residence. There is usually at foreign capitals an officer having charge of such ceremonial matters, and it is advisable to confer with him informally, in order to insure appropriate conformity to established rules. In the absence of such an official, he should obtain the necessary information from the dean of the diplomatic corps.

II-15. *Official calls.*—There is also in each country an established rule as to official calls. The diplomatic representative should, immediately upon his arrival, inform himself upon this subject either through the master of ceremonies or the dean of the diplomatic corps and conform to the rule.

II-16. [*Accompanied by secretary.*]

II-17. *Relations with colleagues.*—A diplomatic representative should omit no occasion to maintain the most friendly personal and social relations with the members of the government and of the diplomatic corps at the place of his residence.

II-18. *Official duties begin.*—The official duties of a diplomatic representative begin on the day of his formal reception by the chief of the state to which he is accredited, or in the case of the chargé d'affaires, by the Minister for Foreign Affairs. It may, however, happen that the formal audience of reception is delayed, in which case the Minister for Foreign Affairs may arrange for the transaction of diplomatic business with the new representative pending such reception. In that event, the official duties of the representative begin immediately.

II-19. *Right to resign.*—A civil officer has a right to resign his office at pleasure, and, to take effect, it is only necessary that the resignation should be received by the President. (*United States v. Wright*, 1 McLean 509.) This rigid construction is, however, not adhered to in practice in the case of diplomatic officers, and a conventional date is assigned when a resignation shall be deemed to take effect.

II-20. [*Resignation—How tendered.*]

II-21. [*When resignation takes effect.*]

II-22. [*Resignation while absent from post.*]

II-23. [*Resignation at end of leave.*]

II-24. [*Recall.*]

II-25. *When functions cease upon recall.*—In any case, a diplomatic officer's official functions do not cease until he has received notification of the appointment of his successor, either by specific instructions from the Department of State or by the exhibition of his successor's commission. (6 Op. Att. Gen. 87.)

II-26. [*Recall while on leave.*]

II-27. [*Unexpended balances.*]

II-28. *Temporary charge of mission.*—A retiring diplomatic representative has no authority to install a consular officer in charge of a mission, unless expressly authorized by the President so to do. (5 C. C. Reps. 430.)

II-29. *When official duties cease.*—The official duties of a retiring diplomatic representative, and also the regular salary to which he is entitled while at his post of duty, cease on the day of presentation of his letter of recall to the chief of the state, or, in the case of a commissioned chargé d'affaires, to the Minister for Foreign Affairs. If for any reason he should not be able to present his letter of recall in formal audience of leave-taking, his duties and salary cease on taking his departure from the seat of the mission, unless sooner relieved by his successor.

II-30. [*Transit.*]

II-31. [*Homeward transit.*]

II-32. [*Final settlement of accounts.*]

II-33. *Free entry of effects.*—Diplomatic officers, at the expiration of their service abroad, have no special authority of law to have their personal effects brought into the United States free of duty. It is customary, however, for the Secretary of the Treasury, on due application being made by the returning officer through the Secretary of State, to grant the admission of the household effects and personal property in use by the officer during his official residence abroad. In applying for such privilege, the officer should state the name of the vessel in which his effects are to arrive and the port of entry, and details as to the number of cases, to whom addressed, etc.

[CHAPTER III, FOREIGN SERVICE OFFICERS, *is omitted.*]

CHAPTER IV

MILITARY, NAVAL, AND COMMERCIAL ATTACHÉS, AND FOREIGN SERVICE OFFICERS ASSIGNED TO LANGUAGE STUDY

IV-1. *Attachés.*—An attaché is not recognized under the law as a diplomatic officer. (R. S., sec. 1674, par. 5.) Should it come to the knowledge of a diplomatic representative that any person is representing himself as an "attaché" or styling himself a secretary of the mission without warrant, it will be his duty to report the fact to the Department of State and to make it known informally to the government to which he is accredited.

IV-2. *How designated.*—Military, naval, and commercial attachés are assigned by the Secretaries of War, Navy, and Commerce, respectively, and commissioned by the Secretary of State to reside at the seats of the various missions as the public interests demand. Each mission should promptly inform the Foreign Office of the designation of such attachés.

IV-3. *Duties.*—The duties of military, naval, and commercial attachés are such as may be assigned to them by the heads of their respective departments. They receive their instructions from and report directly to them. While these duties are not under the direction or control of the chief of mission, they are subject to his supervision. However, in ceremonial matters, attachés are subject to the direction of the chief of mission and in their personal conduct are responsible to him. He should report to the Department any conduct of the attachés which he considers unbecoming or embarrassing to the mission. It is essential that the attachés' work be in harmony with the chief of mission, as well as with the personnel of the embassy or legation and with consular officials. It is not doubted that any assistance desired by the chief of mission, owing to the professional knowledge that such attachés possess, will be freely and cheerfully accorded.

IV-4. *Ceremonial representation.*—A military, naval, or commercial attaché forms a part of the official staff of a mission, and should be present at all ceremonies and official functions where his attendance is desired by the chief of mission. (E. O. March 8, 1927.)

IV-5. [*Visits of American naval units.*]

IV-6. [*Salutes.*]

IV-7. [*Social attentions to naval officers.*]

IV-8-9. [*Regulations governing Foreign Service officers assigned for language study in certain countries.*]

[CHAPTER V, CLERKS, is omitted.]

[CHAPTER VI, RESIDENCE, CHANCERY, OFFICE HOURS, LEAVES OF ABSENCE, TRANSFERS, is omitted.]

CHAPTER VII

DIPLOMATIC IMMUNITIES, PRIVILEGES

VII-1. *Immunity from arrest—Process.*—A diplomatic representative possesses immunity from the criminal and civil jurisdiction of the country of his sojourn and cannot be sued, arrested, or punished by the law of that country. (R. S. secs. 4063, 4064.) Neither can he waive his privilege, except by the consent of his government; for it belongs to his office, not to himself. It is not to be supposed that any representative of this country would intentionally avail himself of this right to evade just obligations.

VII-2. *Property not exempt from process.*—If a diplomatic representative holds, in a foreign country, real or personal property aside from that

which pertains to him as a diplomatic representative, it is subject to the local laws.

VII-3. *Exemption from testifying.*—A diplomatic representative cannot be compelled to testify, in the country of his sojourn, before any tribunal whatsoever. This right is regarded as appertaining to his office, not to his person, and is one of which he cannot divest himself except by the consent of his government. Therefore, even if a diplomatic representative of the United States be called upon to give testimony under circumstances which do not concern the business of the mission, and which are of a nature to counsel him to respond in the interest of justice, he should not do so without the consent of the President, obtained through the Secretary of State.

VII-4. *Inviolability of domicile.*—Immunity from local jurisdiction extends to a diplomatic representative's dwelling house and goods and the archives of the mission. These cannot be entered, searched, or detained under process of local law or by the local authorities.

VII-5. *Asylum.*—The privilege of immunity from local jurisdiction does not embrace the right of asylum for persons outside of a representative's official or personal household.

VII-6. *Unsanctioned asylum.*—In some countries, where frequent revolutions occur and consequent instability of government exists, the practice of extraterritorial asylum has been so often resorted to that it has become established to an extent not elsewhere admitted, is virtually recognized by the local government, and is regarded in anticipation as the permissible recourse of unsuccessful insurgents. This Government, which does not look with favor upon such usage, wishes to impress upon its representatives that no encouragement to expect asylum should ever be given. In order that there may be no confusion in their minds it desires to make clear its position as to the nature and extent of the so-called right of asylum and the circumstances in which it may properly be invoked. The granting of asylum is permissible only to afford temporary shelter to a person under certain conditions of actual danger, and should not be given in the absence of the emergency which would justify such action. The emergency may arise through imminent danger of mob violence, imminent danger of obviously illegal acts by the duly constituted authorities, or imminent danger of violence at the hands of other agencies, such as revolutionists or persons engaged in an attempt to overthrow the established government. In any case asylum should not be granted if the danger to the person concerned is incurred as a result of criminal activities. The efficacy of asylum is necessarily limited by the extent of immunity from local jurisdiction to which the premises where it is invoked is entitled. The quality of inviolability is inherent only in diplomatic missions but is possessed by non-diplomatic missions, e.g., consulates, to the degree essential for the proper

exercise of their functions. In the one case the obligation which rests upon the local authorities to respect the inviolability of the premises is absolute, whereas in the other it is contingent. This distinction is important in determining the attitude to be assumed toward the authorities of the local government. It is of course to be understood that only those authorities would have the right to question the propriety of affording asylum in any case whatever. Should there be an attempt to do so by any other agency through acts or threatened acts of violence this Government would expect and insist upon protection. It will not, however, countenance any attempt by its representatives knowingly to harbor offenders against the laws from the pursuit of the legitimate agents of justice.

VII-7. *Immunities of secretaries.*—A secretary of a mission is, according to the admitted principles of international law, a "public minister." His personal privileges, immunities, domiciliary privileges, and exemptions are generally those of the diplomatic representative of whose official household he forms a part.

VII-8. *The diplomatic representative's household.*—The personal immunity of a diplomatic representative extends to his household, and especially to his official staff. Generally, his servants share therein; but this does not always apply when they are citizens or subjects of the country of his sojourn. (Extent of immunity accorded by the United States to foreign ministers, their suites, etc., is set forth in R. S., secs. 4063, 4064, 4065.)

VII-9. *Exemption from military service.*—Cases have arisen where a diplomatic representative has claimed for a native servant exemption from military service. His right to do so is not clear, and in the future the diplomatic representatives of the United States are advised against questioning the right of the native government to claim such service from one of its subjects in his employ. It is to be expected that the claim, if made, will be presented courteously to the chief of mission.

VII-10. *List of household to be furnished.*—It is in some places customary for a diplomatic representative to furnish to the local government a list of the members of his household, including his hired servants, with a statement of the age and nationality of each. When this is requested, it should always be given.

VII-11. *Bearers of despatches.*—Couriers and bearers of despatches employed by a diplomatic representative in the service of his government are privileged persons, as far as is necessary for their particular service, whether in the state to which the representative is accredited or in the territory of a third state with which the government they serve is at peace.

VII-12. *Importations free of duty.*—It is a common usage of international intercourse that to a diplomatic representative shall be conceded the privilege of importation of effects for his personal or official use, or

for the use of his immediate family, without payment of customs duties thereon. The application of this privilege varies in different countries, and in some is restricted to the chief of mission. It is the duty of the representative to acquaint himself with the formalities and limitations prescribed in such case by the local law or regulations and to conform therewith. The privilege is one of usage and tradition, rather than of inherent right. The practice of the Government of the United States is to accord such privileges to chiefs of mission, and on a reciprocal basis to members of their staffs. In the case of mail parcels, sealed or unsealed, addressed to a member of the family of the chief of mission, members of the diplomatic staff or their families, customs inspection is insisted on, even where admission is granted free of duty.

VII-13. *Transit through a third country.*—Transit free of customs dues is usually conceded by a third state through whose territories a diplomatic representative passes on his way to or from his post. His status, however, while in the third country lacks the extraterritorial element of immunity belonging to him in the country to which he is accredited. . . .

[*Chapters VIII-X omitted.* VIII: POLITICAL REPORTING—SUPERVISION; IX: NEGOTIATION OF TREATIES; X: CITIZENSHIP.]

CHAPTER XI

DUTIES TOWARD AMERICAN CITIZENS

XI-1. *General duties toward American citizens.*—The powers and duties of diplomatic officers in regard to their fellow citizens depend in a great measure upon the municipal law of the United States. No civil or criminal jurisdiction can be exercised by them over their countrymen without express authority by law or by treaty stipulation with the state in which they reside. They are particularly cautioned not to enter into any contentions that can be avoided, either with their countrymen or with the subjects or authorities of the country. They should use every endeavor to settle in an amicable manner all disputes in which their countrymen may be concerned, but they should take no part in litigation between citizens. They should countenance and protect them before the authorities of the country in all cases in which they may be injured or oppressed, but their efforts should not be extended to those who have been wilfully guilty of an infraction of the local laws, it being incumbent upon citizens of the United States to observe the laws of the country where they may be. It is their duty to endeavor on all occasions to maintain and promote all the rightful interests of citizens, and to protect them in all privileges that are provided for by treaty or are conceded by usage. If representations are made and fail to secure the proper redress, the case should be reported to the Department of State.

XI-2. *Protection abroad of naturalized citizens.*—All naturalized citizens of the United States while in foreign countries are entitled to and shall receive the same protection of person and property which is accorded to native-born citizens. (R. S., sec. 2000.)

XI-3. *Protection of children born abroad of American fathers.*—All children born outside the limits of the United States who are citizens thereof in accordance with the provision of section 1993 of the *Revised Statutes of the United States*, and who continue to reside outside the United States, shall, in order to receive the protection of this Government be required upon reaching the age of 18 years to record at the American Consulate their intention to become residents and remain citizens of the United States, and shall be further required to take the oath of allegiance to the United States upon attaining their majority (Act of March 2, 1907, 34 Stat. L. 1228).

XI-4. *Evidence to be filed.*—Diplomatic and consular officers are required to file with the Department of State duplicates of any evidence, registration, or other acts, taken before them in conservation or resumption of citizenship and the right to protection. (Act of March 2, 1907, 34 Stat. L. 1228.)

XI-5. *Circumstances under which protection is withheld.*—Ordinarily, citizens of the United States, whether native or naturalized, subject to the provisions of the foregoing paragraphs, are entitled to the protection and intervention of diplomatic and consular officers in proper cases. The right of a citizen, however, to claim protection is founded upon the correlative right of this Government to claim his allegiance and support. Where a citizen, therefore, has resided abroad for a long period of time under such circumstances as to warrant the inference that he has practically abandoned his country, intervention may be withheld pending the instructions of the Department of State. Anyone who has expatriated himself or who, under the provisions of a treaty of naturalization or statute (Act of March 2, 1907, 34 Stat. L. 1228) is presumed to have renounced his naturalization or to have ceased to be an American citizen, is not entitled to intervention on the part of any diplomatic or consular officer of the United States.

XI-6. *Intervention.*—When a diplomatic officer is satisfied that an applicant for protection as an American citizen has a right to intervention, he should interest himself in the applicant's behalf, examining carefully into his grievances. If he finds that the complaints are well founded he should interpose firmly, but with courtesy and moderation, with the appropriate authorities and report the case to the Department of State for its further action, if any be required.

XI-7. [*Data concerning aid given American commercial interests.*]

XI-8. *Claims.*—The interposition of diplomatic representatives is often asked by their countrymen to aid in the collection of claims against the

government to which they are accredited. If the claim is founded in contract, they must not intervene without specific instructions to do so. If it is founded in tort, they will, as a rule, in like manner seek previous instructions before intervening, unless the person of the claimant be assailed or there be pressing necessity for action in his behalf before they can communicate with the Department of State; in which event they will communicate in full the reasons for their action.

XI-9. *Destitute Americans*.—There is no appropriation or authority for the relief by a diplomatic representative of a distressed citizen of the United States or for furnishing him transportation home.

The occasion may arise when the Department will instruct a diplomatic officer by telegram to pay an individual money for relief purposes. . . .

XI-10. *Social relations*.—Though the social relations of a diplomatic representative to his own countrymen resident in or visiting the capital where he resides should be cordial, the latter have no claim upon his hospitality requiring him to assume expenses or burdens not in accord with his official duties or compensation.

XI-11. [*Letters of introduction*.]

XI-12. *Presentation of American citizens at foreign courts*.—It is the policy of the Department of State not to take any part in matters concerning the presentation of American citizens at foreign courts, but to leave such matters entirely to the discretion of the ambassadors and ministers in consultation with the officials in charge of such ceremonies.

The chief of mission must necessarily be sponsor for the persons presented and, having before him the names of all Americans seeking presentation, is best acquainted with the qualifications of the applicants to meet the conditions and terms prescribed by the particular court.

[The following chapters are omitted:

CHAPTER XII: PASSPORTS AND VISAS

CHAPTER XIII: NOTARIAL ACTS AND FEES

CHAPTER XIV: EXTRADITION

CHAPTER XV: PUBLIC ADDRESSES, TESTIMONIALS, ETC.

CHAPTER XVI: MISCELLANEOUS

CHAPTER XVII: OFFICE MANAGEMENT, ARCHIVES, CIPHERS, AND POUCHES

CHAPTER XVIII: FORM OF CORRESPONDENCE WITH THE DEPARTMENT

CHAPTER XIX: CORRESPONDENCE WITH FOREIGN GOVERNMENTS]

§ 82. STATUTORY IMMUNITY OF DIPLOMATIC OFFICERS IN THE UNITED STATES

In 1708 the Ambassador of the Czar in London was arrested in an action for debt and required to give bail. In response to the Czar's protest and as "an apology and humiliation from the whole nation," the *Statute of Anne* (7 Anne, c. 12) was enacted, a finely illuminated copy being sent to the Czar by special ambassador. When, in 1764, this Statute was being considered by Lord Mansfield, he said that it was merely declaratory of the law of nations. "All that is new in this Act is the clause which gives a summary jurisdiction for the punishment of the infractors of this law." *Triquet v. Bath*, 3 Burrow, 1478.

These facts lend greater interest to the fact that the American Statute of 1790, printed below, is in substantially the same terms as those of the Statute of Anne.

a. Act of April 30, 1790

As re-enacted in *Revised Statutes*, 1878, Sections 4062-4066.

SECTION 4062. Every person who violates any safe conduct or passport duly obtained and issued under authority of the United States; or who assaults, strikes, wounds, imprisons, or in any other manner offers violence to the person of a public minister, in violation of the law of nations, shall be imprisoned for not more than three years, and fined, at the discretion of the court.

SECTION 4063. Whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any public minister of any foreign prince or state, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void.

SECTION 4064. Whenever any writ or process is sued out in violation of the preceding section, every person by whom the same is obtained or prosecuted, whether as party or as attorney or solicitor, and every officer concerned in executing it, shall be deemed a violator of the laws of nations, and a disturber of the public repose, and shall be imprisoned for not more than three years, and fined at the discretion of the court.

SECTION 4065. The two preceding sections shall not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States, in the service of a public minister, and the process is founded upon a debt contracted before he entered upon such service; nor shall the preceding section apply to any case where the person against whom the process is issued is a domestic servant of a public min-

ister, unless the name of the servant has, before the issuing thereof, been registered in the Department of State, and transmitted by the Secretary of State to the marshal of the District of Columbia, who shall upon receipt thereof post the same in some public place in his office.

SECTION 4066. All persons shall have resort to the list of names so posted in the marshal's office, and may take copies without fee.

b. Joint Resolution to Protect Foreign Diplomatic and Consular Officers and the Buildings and Premises Occupied by Them in the District of Columbia

APPROVED FEBRUARY 15, 1938

Public Resolution No. 79, 75th Cong., Chap. 29, 3d Sess.
(S. J. Res. 191).

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be unlawful to display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party, or organization, or any officer or officers thereof, or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government, party, or organization, or to intimidate, coerce, harass, or bring into public disrepute any officer or officers or diplomatic or consular representatives of any foreign government, or to interfere with the free and safe pursuit of the duties of any diplomatic or consular representatives of any foreign government, within five hundred feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes, except by, and in accordance with, a permit issued by the superintendent of police of the said District; or to congregate within five hundred feet of any such building or premises, and refuse to disperse after having been ordered so to do by the police authorities of the said District.

SEC. 2. The police court of the District of Columbia shall have jurisdiction of offenses committed in violation of this joint resolution; and any person convicted of violating any of the provisions of this joint resolution shall be punished by a fine not exceeding \$100 or by imprisonment not exceeding sixty days, or both: *Provided, however*, That nothing contained in this joint resolution shall be construed to prohibit picketing, as a result of bona-fide labor disputes regarding the alteration, repair, or construction of either buildings or premises occupied, for business purposes, wholly or in part, by representatives of foreign governments.

§ 83. DIPLOMATIC IMMUNITY: CIVIL

The Magdalena Steam Navigation Company v. Martin

ENGLAND, COURT OF QUEEN'S BENCH, 1859.

2 Ellis & Ellis, 94.

LORD CAMPBELL C. J. . . . delivered the judgment of the Court.

The question raised by this record is, whether the public minister of a foreign state, accredited to and received by Her Majesty, having no real property in England, and having done nothing to disentitle him to the privileges generally belonging to such public minister, may be sued, against his will, in the Courts of this country, for a debt, neither his person nor his goods being touched by the suit, while he remains such public minister. The defendant is accredited to and received by Her Majesty as Envoy Extraordinary and Minister Plenipotentiary for the Republics of Guatemala and New Granada respectively; and a writ has been sued out against him and served upon him, to recover an alleged debt, for the purpose of prosecuting this action to judgment against him whilst he continues such public minister. He says, by his plea to the jurisdiction of the Court, that, by reason of his privilege as such public minister, he ought not to be compelled to answer. We are of opinion that his plea is good, and that we are bound to give judgment in his favour. The great principle is to be found in Grotius *de Jure Belli et Pacis*, lib. 2, c. 18, s. 9, "*Omnis coactio abesse a legato debet.*" He is to be left at liberty to devote himself body and soul to the business of his embassy. He does not owe even a temporary allegiance to the Sovereign to whom he is accredited, and he has at least as great privileges from suits as the Sovereign whom he represents. He is not supposed even to live within the territory of the Sovereign to whom he is accredited, and, if he has done nothing to forfeit or to waive his privilege, he is for all juridical purposes supposed still to be in his own country. For these reasons, the rule laid down by all jurists of authority who have written upon the subject is, that an ambassador is exempt from the jurisdiction of the Courts of the country in which he resides as ambassador. Whatever exceptions there may be, they acknowledge and prove this rule. The counsel for the plaintiffs, admitting that the person of an ambassador cannot be lawfully imprisoned in a suit, and that his goods cannot be taken in execution, contended that he might be cited and impleaded; and he referred to the decision of the tribunal at the Hague, in 1720, which is reported by Bynkerschoek, and was the cause of that great jurist writing his valuable treatise *De Foro Legatorum*. But this case is to be found in chap. xiv., entitled "*De Legato Mercatore,*" in which is explained the ex-

ception of an ambassador engaging in commerce for his private gain. The Envoy Extraordinary of the Duke of Holstein to the States General, leaving the Hague, where he ought to have resided, "*Amsterdamum se confert, et strenuè mercatorem agit. Plurium debitor factus, Hagam revertitur, sed et plures curiam Hollandiæ adeunt, et impetrant mandatum arresti et in jus vocationis.*" The arrest was granted to operate on all goods, money and effects within the jurisdiction of the tribunal, with the exception of the movables, equipages and other things belonging to him in his character of ambassador. But this citation was entirely in respect of his having engaged in commerce, and shews that otherwise he would not have been subject to the jurisdiction of the Dutch Courts. Lord Coke's authority (4 Inst. 153) was cited, where, writing of the privileges of an ambassador, having said that "for any crime committed *contrà jus gentium*, as treason, felony, adultery, or any other crime which is against the law of nations, he loseth the privilege and dignity of an ambassador, as unworthy of so high a place," he adds, "and so of contracts that be good *jure gentium* he must answer here." There does not seem to be anything in the contract set out in this declaration contrary to the law of nations; but Lord Coke, who is so great an authority as to our municipal law, is entitled to little respect as a general jurist.

Mr. Bovill, being driven from his supposition that the writ in this case might be sued out only to save the Statute of Limitations, by the fact that it had been served upon the defendant, and by the allegation in the plea that it was sued out for the purpose of prosecuting this action to judgment, strenuously maintained that at all events the action could be prosecuted to that stage, with a view to ascertain the amount of the debt, and to enable the plaintiffs to have execution on the judgment when the defendant may cease to be a public minister. But although this suggestion is thrown out in the discussion which took place in the Common Pleas, in *Taylor v. Best*, 14 Com. B. 487, 493 (per Maule J.), it is supported by no authority; the proceeding would be wholly anomalous; it violates the principle laid down by Grotius; it would produce the most serious inconvenience to the party sued; and it could hardly be of any benefit to the plaintiffs. In the first place, there is great difficulty in seeing how the writ can properly be served, for the ambassador's house is sacred, and is considered part of the territory of the Sovereign he represents; nor could the ambassador be safely stopped in the street to receive the writ, as he may be proceeding to the Court of our Queen, or to negotiate the affairs of his Sovereign with one of her ministers. It is allowed that he would not be bound to answer interrogatories, or to obey a subpoena requiring him to be examined as a witness for the plaintiffs. But he must defend the action, which may be for a debt of 100,000 £., or for a libel, or to recover damages for some gross fraud

imputed to him. He must retain an attorney and counsel, and subpoena witnesses in his defence. The trial may last many days, and his personal attendance may be necessary to instruct his legal advisers. Can all this take place without "coactio" to the ambassador? Then, what benefit does it produce to the plaintiffs? There can be no execution upon it while the ambassador is accredited, nor even when he is recalled, if he only remains a reasonable time in this country after his recall. In countries where there may be a citation by seizure of goods, if an ambassador loses his privilege by engaging in commerce, he not only may be cited, but all his goods unconnected with his diplomatic functions may be arrested to force him to appear, and may afterwards, while he continues ambassador, be taken in execution on the judgment.

Reference was frequently made during the argument to stat. 7 Anne, c. 12; but it can be of no service to the plaintiffs. The 1st and 3d sections are only declaratory of the law of nations, in conformity with what we have laid down; and the other sections, which regulate procedure, do not touch the extent of the immunity to which the ambassador is entitled. The Russian ambassador had been taken from his coach and imprisoned; but the statute cannot be considered as directed only against bailable process. The writs and processes described in the 3rd section are not to be confined to such as directly touch the person or goods of an ambassador, but extend to such as, in their usual consequences, would have this effect. At any rate, it never was intended by this statute to abridge the immunity which the law of nations gives to ambassadors, that they shall not be impleaded in the Courts of the country to which they are accredited. An argument was drawn from the course pursued in some instances of setting aside bail bonds given by persons having the privilege of ambassadors, or their servants, on filing common bail. This, perhaps, is as much as could reasonably be asked on a summary application to the Court, but does not shew that the action may not be entirely stopped by a plea regularly pleaded to the jurisdiction of the Court.

Some inconveniences have been pointed out as arising from this doctrine, which, we think, need not be experienced. If the ambassador has contracted jointly with others, the objection that he is not joined as a defendant may be met by shewing that he is not liable to be sued. As to the difficulty of removing an ambassador from a house of which he unlawfully keeps possession, De Wicquefort, and other writers of authority on this subject, point out that in such cases there may be a specific remedy by injunction. Those who cannot safely trust to the honour of an ambassador, in supplying him with what he wants, may refuse to deal with him without a surety, who may be sued; and the resource is always open of making a complaint to the government by which the ambassador is accredited.

Such inconveniences are trifling, compared with those which might arise were it to be held that all public ministers may be impleaded in our municipal Courts, and that judgment may be obtained against them in all actions, either *ex contractu* or *ex delicto*. It certainly has not hitherto been expressly decided that a public minister duly accredited to the Queen by a foreign state is privileged from all liability to be sued here in civil actions; but we think that this follows from well established principles, and we give judgment for the defendant.

Judgment for the defendant.

§ 84. CASES ON DIPLOMATIC IMMUNITY

NOTE BY THE EDITOR

On the whole subject of diplomatic immunities, both for subject matter and citations, see the Harvard Law School Research in International Law, "Draft Convention on Diplomatic Privileges and Immunities," 26 *A.J.I.L.* (Supp., April, 1932), 15-187. Cases often cited are:

Great Britain.—*Barbuit's Case* (1737) 25 Eng. Rep. 777; *Triquet v. Bath* (1764) 97 Eng. Rep. 936 (immunity of servant); *Heathfield v. Chilton* (1767) 98 Eng. Rep. 50 (same); *Novello v. Toogood* (1823) 107 Eng. Rep. 204 (same); *Taylor v. Best* (1854) 14 C. B. 487 (immunity where minister enters appearance in court); *In re Republic of Bolivia Exploration Syndicate* (1913) L. R. [1914] 1 Ch. D. 139 (waiver of immunity); *Dickinson v. Del Solar* (1929) [1930] 1 K. B. 376 (same); *Macartney v. Garbutt* (1890) L. R. 24 Q. B. D. 368 (tax immunity of minister subject of State to which accredited); *Parkinson v. Potter* (1885) L. R. 16 Q. B. D. 152 (immunity of attaché from local rates); *Musurus Bey v. Gadban* [1894] 2 Q. B. 352 (immunity of ambassador after accrediting of his successor); *Engelke v. Musmann* [1928] A. C. 433 (persons entitled to immunity determined by executive); *Fenton Textile Association v. Krassin* (1921) 38 Times L. R. 259 (immunity of agent of government not recognized *de jure*).

United States.—*U. S. v. Liddle* (1808) Fed. Cas. No. 15,598 (assault committed by a minister); *U. S. v. Ortega* (1825) Fed. Cas. No. 15,971 (same); *Respublica v. De Longchamps* (1784) 1 Dallas (Pa.) 111 (immunity of Secretary of Legation); *U. S. v. Benner* (1830) Fed. Cas. No. 14,568 (arrest of attaché); *U. S. v. Hand* (1810) Fed. Cas. No. 15,297 (immunity of official residence); *Herman v. Apetz* (1927) 130 Misc. N. Y. 618 (immunity of wife of Secretary of Legation); *U. S. v. La Fontaine* (1831) Fed. Cas. 15,550 (immunity of cook); *Ex parte Chenk Gar Lim* (1921) 285 F. 396 (immunity of son of legation official); *Carbone v. Carbone* (1924) 123 Misc. N. Y. 656 (immunity in U. S. of Panama attaché accredited to

Italy); *Holbrook, Nelson & Co. v. Henderson* (1839) 6 N. Y. Super. Ct. (4 Sandf.) 619 (immunity of ambassador of Texas accredited to France, in N. Y. Court).

Austria.—*Decision of March 15, 1921, 6 Entscheidungen des Obersten Gerichtshofes in Zivilsachen*, 69 (immunity of legation building from execution).

Chile.—*Pacey v. Barroso* (1926) *Annual Digest*, 1927-1928, 369 (secretary of legation held liable to prosecution for fraud).

Ecuador.—*Victor Eastman Cox v. Teresa Valdivieso* (1930) *Annual Digest*, 1929-1930, 303 (judicial power of President of Supreme Court over affairs of ministers, extends to affairs of minister's wife).

France.—*B— v. D—* (1927) 55 *Clunet*, 637 (civil immunity of counselor of legation); *Foucault de Mondion v. Tcheng-Ki-Tong* (1892) 19 *Clunet*, 429 (civil immunity of secretary of legation); *Salm v. Frazier* (1933), reported 28 *A.J.I.L.* (1934), 382 (enforcibility of Austrian judgment against U. S. Commissioner for Austria in a French court); *Procureur général v. Nazare Aga* (1921) 48 *Clunet* 922 (civil liability for debt incurred before counselor of legation assumed his functions); and see citations at p. 102, Harvard Draft Convention on Diplomatic Privileges and Immunities, 26 *A.J.I.L. (Spec. Supp., April, 1932)*.

Italy.—"Italian jurisprudence contains two judgments by the Rome Supreme Court of Cassation—one dated April 20, 1915 (*Revista di diritto internazionale*, 1915; *Foro Italiano*, 1915, I, 1330); the other dated December 9th, 1921, and published on January 31st, 1922 (*Revista di diritto internazionale*, 1924, page 173; *Foro Italiano*, 1922, I, 334)—pronounced when this Supreme Court was not yet the only final Court of Cassation in the Kingdom—which affirmed the principle that the immunity of diplomatic agents from jurisdiction in civil questions only extends to acts performed in the exercise of their official functions, and accordingly does not apply to obligations contracted by them in their private capacity. These judgments of the Courts have been strongly criticised, however, even in Italy, from the point of view of international law as it exists today, and it cannot be said that in Italy the law is definitely settled in this sense." Diena, *Report on Diplomatic Privileges and Immunities, League of Nations Doc., C. 45. M. 22, 1926, V*, reprinted in 20 *A.J.I.L. (Spec. Supp., July, 1926)*, 151, 156-157. See *Case of Rinaldi* (1915) 9 *Revista* (1915) 215.

Peru.—*In re Succession of Dona Carmen de Goyenoché* (1921) *Annual Digest*, 1919-1922, 291 (Peruvian minister to Holy See having previous to his appointment established a voluntary domicile abroad, has no domicile in Peru for tax purposes).

Switzerland.—*Swiss Confederation v. Justh* (1927) 40 *Revue Pénale Suisse* (1927) 179 (immunity of representative of State at the League of Nations); *V— v. D—* (1926) 54 *Clunet* 1175 (same).

Consult also *Annual Digest of Public International Law Cases* under "Diplomatic Intercourse and Privileges," and F. Deák, "Classification, Immunities, and Privileges of Diplomatic Agents," 1 *Southern California Law Review* (1928), 209-252, 332-354.

§ 85. DISTINCTION BETWEEN DIPLOMATIC AND CONSULAR IMMUNITIES

In Re Baiz

SUPREME COURT OF THE UNITED STATES, 1890

135 U. S. 403.

[On petition for a writ of prohibition or *mandamus*.]

On the 29th day of June, 1889, an action was commenced by one John Henry Hollander in the District Court of the United States for the Southern District of New York against Jacob Baiz, to recover damages for the publication of an alleged libel upon the plaintiff, and a summons was served upon him on the 2d day of July of that year.

[The defendant pleaded to the jurisdiction of the court, stating that since July, 1887, he had been Consul General of Guatemala at the city of New York; that from January 16, 1889, until July 10, 1889, he was acting minister and sole representative of Guatemala in the United States, in the absence of its duly accredited envoy extraordinary and minister plenipotentiary to this country; that on June 9, 1889, during the period in which he acted as minister, he communicated to the Associated Press a decree of Guatemala of May 14, 1889, under instructions from Guatemala so to do, which communication constituted the libel in question, and that because of the defendant's position, as acting minister at the time of such communication, he was exempt from the jurisdiction of the court.]

MR. CHIEF JUSTICE FULLER delivered the opinion of the court. . . .

Under section 2, Art. II, of the Constitution, the President is vested with power to "appoint ambassadors, other public ministers and consuls," and by section 3 it is provided that "he shall receive ambassadors and other public ministers."

These words are descriptive of a class existing by the law of nations, and apply to diplomatic agents whether accredited by the United States to a foreign power or by a foreign power to the United States. . . . These agents may be called ambassadors, envoys, ministers, commissioners, *chargés d'affaires*, agents, or otherwise, but they possess in substance the same func-

tions, rights and privileges as agents of their respective governments for the transaction of its diplomatic business abroad. Their designations are chiefly significant in the relation of rank, precedence or dignity. 7 *Opinions Attys. Gen.* (Cushing), 186.

Hence, when in subdivision fifth of section 1674 of the Revised Statutes we find "diplomatic officer" defined as including "ambassadors, envoys extraordinary, ministers plenipotentiary, ministers resident, commissioners, chargés d'affaires, agents and secretaries of legation, and none others," we understand that to express the view of Congress as to what are included within the term "public ministers," although the section relates to diplomatic officers of the United States.

But the scope of the words "public ministers" is defined in the legislation embodied in Title XLVII, "Foreign Relations," Rev. Stat., 2d ed. 783. [The Court here recites §§ 4062-4065, *Revised Statutes*, printed above, § 82a.]

Section 4130, which is the last section of the title, is as follows: "The word 'minister,' when used in this title, shall be understood to mean the person invested with, and exercising, the principal diplomatic functions. The word 'consul' shall be understood to mean any person invested by the United States with, and exercising, the functions of consul general, vice-consul general, consul or vice-consul."

Sections 4062, 4063, 4064 and 4065 were originally sections 25, 26, 27 and 28 of the Crimes Act of April 30, 1790, c. 9, 1 Stat. 118; and these were drawn from the statute 7 Anne, c. 12, which was declaratory simply of the law of nations, which Lord Mansfield observed, in *Heathfield v. Chilton*, 4 Burrow, 2015, 2016, the act did not intend to alter and could not alter.

In that case, involving the discharge of the defendant from custody, as a domestic servant to the minister of the Prince Bishop of Liege, Lord Mansfield said: "I should desire to know in what manner this minister was accredited—certainly, he is not an ambassador, which is the first rank—envoy, indeed, is a second class; but he is not shown to be even an envoy. He is called 'minister,' 'tis true; but minister (alone) is an equivocal term." The statute of Anne was passed in consequence of the arrest of an ambassador of Peter the Great for debt, and the demand by the Czar that the sheriff of Middlesex and all others concerned in the arrest should be punished with instant death, 1 Bl. Com. 254; and it was in reference to this that Lord Ellenborough, in *Viveash v. Becker*, 3 M. & S. 284, where it was held that a resident merchant of London, who is appointed and acts as a consul to a foreign prince, is not exempt from arrest on mesne process, remarked: "I cannot help thinking that the act of Parliament, which mentions only 'ambassadors and public ministers,' and which was passed at a time when it was an object studiously to comprehend all kinds of public ministers entitled to

these privileges, must be considered as declaratory, not only of what the law of nations is, but of the extent to which that law is to be carried."

Three cases are cited by counsel for petitioner arising under or involving the act of 1790. In *United States v. Liddle*, 2 Wash. C. C. 205, in the case of an indictment for an assault and battery on a member of a foreign legation, it was held that the certificate of the Secretary of State, dated subsequently to the assault and battery, is the best evidence to prove the diplomatic character of a person accredited as a minister by the government of the United States. The certificate from the Secretary of State, Mr. Madison, stated that "when Mr. Feronda produced to the President his credentials as chargé des affaires of Spain, he also introduced De Lima, as a gentleman attached to the legation and performing the duties of secretary of legation," and the certificate was held to be the best evidence to prove that Feronda was received and accredited, and that at the same time De Lima was presented and received as secretary attached to the legation. In *United States v. Ortega*, 4 Wash. C. C. 531, there was produced in court an official letter from the Spanish minister to the Secretary of State, informing him that he had appointed Mr. Salmon chargé d'affaires; a letter from the minister to Mr. Salmon; a letter from the Secretary of State addressed to the Spanish minister, recognizing the character of Mr. Salmon; two letters from the Secretary of State addressed to Mr. Salmon as chargé d'affaires; and the deposition of the chief clerk of the State Department that Mr. Salmon was recognized by the President as chargé d'affaires, and was accredited by the Secretary of State. In *United States v. Benner*, Baldwin, 234, the court was furnished with a certificate from the Secretary of State that the Danish minister had by letter informed the department that Mr. Brandis had arrived in this country in the character of attaché to the legation, and that said Brandis had accordingly, since that date, been recognized by the department as attached to the legation in that character.

These cases clearly indicate the nature of the evidence proper to establish whether a person is a public minister within the meaning of the Constitution and the laws, and that the inquiry before us may be answered by such evidence, if adduced.

Was Consul General Baiz a person "invested with and exercising the principal diplomatic functions," within section 4130, or a "diplomatic officer," within section 1674? His counsel claim in their motion that he was "the acting minister or chargé d'affaires of the Republics of Guatemala, Salvador and Honduras in the United States," and so recognized by the State Department, and that he exercised diplomatic functions as such, and therefore was a public minister, within the statute.

By the Congresses of Vienna and Aix-la-Chapelle four distinct kinds of representation were recognized, of which the fourth comprised chargés

d'affaires, who are appointed by the minister of foreign affairs, and not as the others, nominally or actually by the sovereign. Under the regulations of this Government the representatives of the United States have heretofore been ranked in three grades, the third being *chargés d'affaires*. Secretaries of legation act *ex officio* as *chargés d'affaires ad interim*, and in the absence of the secretary of legation the Secretary of State may designate any competent person to act *ad interim*, in which case he is specifically accredited by letter to the minister for foreign affairs.

Wheaton says: "*Chargés d'affaires*, accredited to the ministers of foreign affairs of the court at which they reside, are either *chargés d'affaires ad hoc*, who are originally sent and accredited by their governments, or *chargés d'affaires per interim*, substituted in the place of the minister of their respective nations during his absence." *Elements Int. Law* (8th ed.), § 215.

Ch. de Martens explains that "*chargés d'affaires ad hoc* on permanent mission are accredited by letters transmitted to the minister of foreign affairs. *Chargés d'affaires ad interim* are presented as such by the minister of the first or second class when he is about to leave his position temporarily or permanently." *Guide Diplomatique*, Vol. I, p. 61, § 16.

"They," observes Twiss in his *Law of Nations*, § 192, "are orally invested with the charge of the embassy or legation by the ambassador or minister himself, to be exercised during his absence from the seat of his mission. They are accordingly announced in this character by him before his departure to the minister of foreign affairs of the court to which he is accredited."

Diplomatic duties are sometimes imposed upon consuls, but only in virtue of the right of a government to designate those who shall represent it in the conduct of international affairs, 1 Calvo, *Droit Int.* 586, 2d ed. Paris 1870, and among the numerous authorities on international laws, cited and quoted from by petitioner's counsel, the attitude of consuls, on whom this function is occasionally conferred, is perhaps as well put by De Clercq and De Vallat as by any, as follows:

"There remains a last consideration to notice, that of a consul who is charged for the time being with the management of the affairs of the diplomatic post; he is accredited in this case in his diplomatic capacity, either by a letter of the minister of foreign affairs of France to the minister of foreign affairs of the country where he is about to reside, or by a letter of the diplomatic agent whose place he is about to fill, or finally by a personal presentation of this agent to the minister of foreign affairs of the country." *Guide Pratique des Consulats*, Vol. I, p. 93.

That it may sometimes happen that consuls are so charged is recognized by section 1738 of the Revised Statutes, which provides:

"No consular officer shall exercise diplomatic functions, or hold any

diplomatic correspondence or relation on the part of the United States, in, with, or to the government or country to which he is appointed, or any other country or government, when there is in such country any officer of the United States authorized to perform diplomatic functions therein; nor in any case, unless expressly authorized by the President so to do."

But in such case their consular character is necessarily subordinated to their superior diplomatic character. "A consul," observed Mr. Justice Story, in *The Anne*, 3 Wheat. 435, 445, "though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt that his sovereign may specially intrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it."

When a consul is appointed chargé d'affaires, he has a double political capacity; but though invested with full diplomatic privileges, he becomes so invested as chargé d'affaires and not as consul, and though authorized as consul to communicate directly with the government in which he resides, he does not thereby obtain the diplomatic privileges of a minister. Atty. Gen. Cushing, 7 Opinions, 342, 345.

This is illustrated by the ruling of Mr. Secretary Blaine, April 12, 1881, that the Consul General of a foreign government was not to be regarded as entitled to the immunities accompanying the possession of diplomatic character, because he was also accredited as the "political agent" so-called of that government, since he was not recognized as performing any acts as such, which he was not equally competent to perform as Consul General. 1 Whart. Dig. Int. Law, 2d ed. c. 4, §88, p. 624.

We are of opinion that Mr. Baiz was not, at the time of the commencement of the suit in question, chargé d'affaires *ad interim* of Guatemala, or invested with and exercising the principal diplomatic functions, or in any view a "diplomatic officer." He was not a public minister within the intent and meaning of § 687; and the District Court had jurisdiction.

The letter of Señor Lainfiesta of January 16, 1889, was neither an appointment of Mr. Baiz as chargé d'affaires *ad interim*, nor equivalent to such an appointment. It was a request in terms that the Secretary of State would "please allow that the Consul General of Guatemala and Honduras, in New York, Mr. Jacob Baiz," should communicate to the office of the Secretary of State any matters relating to the peace of Central America of which that department ought to be informed without delay. This is

not the language of designation to a representative position, and is the language designating a mere medium of communication; and the reply of Mr. Secretary Bayard so treats it, in declaring that the department would be pleased to receive any communication in relation to Central America of which Consul General Baiz might be made the channel. This reply is addressed to Mr. Baiz as "Consul General of Guatemala and Honduras," and not as chargé d'affaires *ad interim*. . . .

The official circular issued by the Department of State, corrected to June 13, 1889, gives the names and description of the chargés d'affaires *ad interim*, in the case of countries represented by ministers who were absent and of countries having no minister, and the date of their presentation. In the instance of Portugal, the name is given of "Consul and acting Consul General, in charge of business of legation," and the fact of the presentation with the date appears in the list; while in the instance of Guatemala, Salvador and Honduras, the name of Mr. Baiz is referred to in a foot-note, with the title of Consul General only; nor does it appear, nor is it claimed to be the fact, that he was ever presented. As stated by counsel, Mr. Webster took the ground, in the case of Mr. Hülsemann, that as chargé d'affaires he was not, as matter of strict right, entitled to be presented to the President; and this is in accordance with the regulations of the State Department. Cons. Reg. 13. But such presentation is undeniably evidence of the possession of diplomatic character, and so would be the formal reception of a chargé d'affaires *ad interim* by the Secretary of State. The inference is obvious, that if the Department of State had regarded Mr. Baiz as chargé d'affaires *ad interim*, or as "invested with and exercising the principal diplomatic functions," his name would have been placed in the list, with some indication of the fact, as the title of chargé, or, if he had been presented, the date of his presentation. Nor can a reason be suggested why the petitioner has not produced in this case a certificate from the Secretary of State that he had been recognized by the Department of State as chargé d'affaires *ad interim* of Guatemala, or as intrusted with diplomatic functions, if there had been such recognition. A certificate of his status was requested by the Guatemalan minister, and if the State Department had understood that Mr. Baiz was in any sense or in any way a "diplomatic representative," no reason is perceived why the Department would not have furnished a certificate to that effect; but instead of that, it contented itself with a courteous reply, giving what was in its judgment a sufficient résumé of the facts, the letter being in effect a polite declination to give the particular certificate desired, because that could not properly be done.

Mr. Baiz was a citizen of the United States and a resident of the city of New York. In many countries it is a state maxim that one of its own

subjects or citizens is not to be received as a foreign diplomatic agent, and a refusal to receive, based on that objection, is always regarded as reasonable. The expediency of avoiding a possible conflict between his privileges as such and his obligations as a subject or citizen, is considered reason enough in itself. Wheaton, 8th ed. § 210; 2 Twiss, *Law of Nations*, 276, § 186; 2 Phill. *Int. Law*, 171. Even an appointment as consul of a native of the place where consular service is required, is, according to Phillimore, "perhaps, rightfully pronounced, by a considerable authority, to be objectionable in principle." Vol. II. p. 291, citing De Martens & De Cussey, *Recueil des Traités*, Index explicatif, p. XXX, tit. "Consuls."

"Other powers," says Calvo, vol. I, p. 559, 2d ed., "admit without difficulty their own citizens as representatives of foreign States, but imposing on them the obligation of amenability to the local laws as to their persons and property. These conditions, which, nevertheless, ought never to go so far as to modify or alter the representative character, ought always to be defined before or at the time of receiving the agent; for otherwise, the latter might find it impossible to claim the honors, rights and prerogatives attached to his employment." See also Heffter, 3d Fr. ed. 387.

In the United States, the rule is expressed by Mr. Secretary Evarts, under date of September 19, 1879, thus: "This government objects to receiving a citizen of the United States as a diplomatic representative of a foreign power. Such citizens, however, are frequently recognized as consular officers of other nations, and this policy is not known to have hitherto occasioned any inconvenience." And again, April 20, 1880, while waiving the obstacle in the particular instance, he says: "The usage of diplomatic intercourse between nations is averse to the acceptance, in the representative capacity, of a person who, while native born in the country which sends him, has yet acquired lawful status as a citizen by naturalization of the country to which he is sent." 1 Wharton *Dig. Int. Law* 2d ed. § 88a, p. 628. Of course the objection would not exist to the same extent in the case of designation for special purposes or temporarily, but it is one purely for the receiving government to insist upon or waive at its pleasure. The presumption, therefore, would ordinarily be against Mr. Baiz's contention, and, as matter of fact, we find that when in 1886, he was appointed chargé d'affaires of the Republic of Honduras to the Government of the United States, Mr. Secretary Bayard declined receiving him as the diplomatic representative of the government of that country, because of his being a citizen of the United States, and advised him that: "It has long been the almost uniform practice of this Government to decline to recognize American citizens as the accredited diplomatic representatives of foreign powers. The statutory and jurisdictional immunities and the customary privileges of right attaching to the office of a foreign minister make it not only inconsistent, but

at times even inconvenient, that a citizen of this country should enjoy so anomalous a position." And in a subsequent communication rendered necessary by a direct question of Mr. Baiz, the Secretary informs him "that it is not the purpose of the department to regard the substitutionary agency, which it cheerfully admits in your case, as conferring upon you personally any diplomatic status whatever." This correspondence disposes of the question before us.

Our conclusion is, as already stated, that the District Court had jurisdiction, and we accordingly discharge the rule and

Deny the writs.

B. Consular Agents

§ 86. STATUS AND FUNCTIONS OF CONSULS

NOTE BY THE EDITOR

"In the year 1931," declared the Harvard Law School Research in International Law, "there appear to have been 17,442 consular officers sent by 60 states and distributed among 850 cities and towns in the territory of 74 states, mandated areas, and dominions. Great Britain alone sent 1,075 to 744 cities and towns, grouped into 256 consular districts. The United States sent 890 consular officers to 373 cities and towns grouped into 174 consular districts. Italy sent 1,008 consuls, France sent 851, Germany sent 553, Japan sent 150, and the U.S.S.R. sent 68. During this year the British empire admitted to the territory of Great Britain, British dominions, colonies, protectorates and mandated communities 2,632 consuls; France admitted 1,566; the United States admitted 1,435; Italy admitted 1,039; Germany admitted 945; Japan admitted 168 and the U.S.S.R. admitted 54. They constitute, thus, the most numerous and most widely distributed of the classes of official agents through which international intercourse is conducted."¹

A consul is not a diplomatic officer. Consuls are not, like diplomatic officers, accredited to governments; they are merely instructed by their own governments to perform, with the permission of receiving governments, certain designated functions in the territory of the latter. While a diplomatic officer's "letter of credence" is addressed by a sovereign or by a government to a foreign sovereign or to a foreign government, a consul's commission is ordinarily addressed "to whom it may concern." In the case

¹ "Legal Position and Functions of Consuls," *Comment* (Quincy Wright, Reporter), 26 *A.J.I.L.* (April, 1932), 201-202.

of a diplomatic officer, once he is "received" by the sovereign or by the government to which he is accredited, his status, functions, and immunities are to a large extent determined by customary international law. A consular officer may not ordinarily begin his functions in the foreign territory until he has been given an "exequatur," or commission, by the receiving State; and then his status, functions, and immunities are determined, not by general international law or custom, but by treaties embodying specific consular provisions in force as between the sending and the receiving States. Within this framework of specific treaty provisions, the consular officer performs the functions authorized in the law of the sending State, but subject, except as provided in the treaty provisions, to the legislation of the receiving State. An example of such treaty provisions is given in § 87 below. An idea of the scope and complexity of the national legislation and regulations on the subject may be obtained from Feller and Hudson, *Diplomatic and Consular Laws and Regulations* (2 vols., 1933). In 1932 the United States had concluded 121 treaties with 65 different States containing provisions on consular matters. "It appears that the world is now covered by a network of consular provisions in bipartite treaties, binding almost every state to other states with which it has commercial relations of importance. Even when the provision itself does not specify consular powers, privileges and immunities in detail, most favored nation clauses in most cases render applicable such provisions of treaties concluded by the parties with other states."² All this is another way of saying that the functions of consuls are established by a very elaborate and specific kind of particular international law; nevertheless, states the Harvard Research, a perusal of the treaty materials "indicates that comparatively few of the functions and privileges of consuls are established by universal international law."³

Fundamental principles have, however, developed. They are stated by the Harvard Research to be: "(1) Consuls do not enjoy a diplomatic character, and (2) the jurisdiction of the territorial sovereign is presumed."⁴ As to (1), *In re Baiz*, § 85 above, suggests the present general attitude; nevertheless, diplomatic officers have on occasion performed consular functions, and consular officers have performed diplomatic functions. A considerable number of States invest their diplomatic officers with consular powers and nearly all States give their diplomatic missions supervision over their consuls in the territory of the receiving State. Some States authorize their consular officers to perform diplomatic functions in certain contingencies, as when there is no diplomatic repre-

² *Ibid.*, p. 212.

³ *Ibid.*, p. 214.

⁴ *Ibid.*, p. 214.

sentative; but it seems clear that the receiving State need not recognize this authorization, and that the authorization does not of itself confer diplomatic immunities, which the receiving State acknowledges only by the reception of a diplomatic officer as such.⁵

As to (2), it seems appropriate again to quote the Harvard Research at length:

Consuls seem to be looked upon as officers of a state who reside and perform certain duties for that state in the territory of another state, with permission of the latter. In the case of diplomatic missions, there is a mutual interest of the receiving and sending state in assuring to the mission a position which will make genuine negotiation possible. In the case of a consular office, however, the sending state alone is interested. The receiving state acquiesces in slight qualifications of its territorial authority in order that it may be permitted to establish consular offices abroad in its own interests. This interpretation is clearly presented by Hall:

"Consuls are persons appointed by a state to reside in foreign countries, and permitted by the government of the latter to reside, for the purpose partly of watching over the interests of the subjects of the state by which they are appointed, and partly of doing certain acts on its behalf which are important to it or to its subjects, but to which the foreign country is indifferent, it being either unaffected by them or affected only in a remote and indirect manner. . . . He is an officer of his state to whom are entrusted special functions which can be carried out in a foreign country without interfering with its jurisdiction. His international action does not extend beyond the unofficial employment of such influence as he may possess, through the fact of his being an official and through his personal character, to assist compatriots who may be in need of his help with the authorities of the country. If he considers it necessary that formal representations shall be made to its government as to treatment experienced by them or other matters concerning them, the step ought in strictness to be taken through the resident diplomatic agent of his state—he not having himself a recognized right to make such communications. Thus he is not internationally a representative of his state, though he possesses a public official character, which the government of the country in which he resides recognizes by sanctioning his stay upon its territory for the purpose of performing his duties; so that he has a sort of scintilla of an international character, sufficiently strong to render any outrage upon him in his official capacity a violation of international law, and to give him the honorary right of placing the arms of his country upon his official house." (W. E. Hall, *Treatise on International Law*, 8th edition, Oxford, 1924, p. 371.)

Thus the presumption of territorial sovereignty is not qualified in the case of consuls by any basic principle of the state system. The state in whose territory a consul lives (the receiving state), is assumed to have all the jurisdiction which a state normally has over foreigners living in its territory, except such as it has given up in order that it and the world may enjoy the convenience of consular establishments.⁶

⁵ See *In re Baiz*, § 85, above.

⁶ "Legal Position and Functions of Consuls," *op. cit.*, pp. 214-215.

The domestic legislation of the sending state determines the various grades of consular officers, but this has little relation to their status and functions. The duties of consular officers, which are extremely extensive and varied, are portrayed in the consular provisions of the Convention of 1923 between the United States and Germany printed below as § 87. Also reproduced below (§ 88) is a case in which a consular officer of the United States claimed an immunity under a treaty which the French court found was not included under it.

Although the Harvard Research regards its Draft, "Legal Position and Functions of Consuls," as "to a considerable extent legislation" (i. e., new law), there is little in it which is not supported by specific treaty provisions somewhere in force. With its accompanying Comment and Appendices (including important multipartite and bipartite treaties and the texts of older draft codes), it constitutes an invaluable reference for the student. For other references, see the list at the end of this chapter.

§ 87. TREATY BASIS OF CONSULAR STATUS AND FUNCTIONS

The following is a good example of the provisions of a consular convention, though the consular articles constitute only one part of this treaty. It furnishes a good idea of what a consular officer is expected to do. By operation of "most favored nation" clauses in consular conventions, by which privileges conferred on consular officers of third States by treaty are automatically extended to consular officers of the contracting parties, a tendency is created for consular practice to become uniform.

Treaty of Friendship, Commerce and Consular Rights Between the United States of America and Germany, December 8, 1923

United States Treaty Series, No. 725, Articles XVII-XXX.

ARTICLE XVII. Each of the High Contracting Parties agrees to receive from the other, consular officers in those of its ports, places and cities, where it may be convenient and which are open to consular representatives of any foreign country.

Consular officers of each of the High Contracting Parties shall, after entering upon their duties, enjoy reciprocally in the territories of the other all the rights, privileges, exemptions and immunities which are enjoyed by officers of the same grade of the most favored nation. As official agents, such officers shall be entitled to the high consideration of all officials, national or local, with whom they have official intercourse in the state which receives them.

The Government of each of the High Contracting Parties shall furnish

free of charge the necessary exequatur of such consular officers of the other as present a regular commission signed by the chief executive of the appointing state and under its great seal; and it shall issue to a subordinate or substitute consular officer duly appointed by an accepted superior consular officer with the approbation of his Government, or by any other competent officer of that Government, such documents as according to the laws of the respective countries shall be requisite for the exercise by the appointee of the consular function. On the exhibition of an exequatur, or other document issued in lieu thereof to such subordinate, such consular officer shall be permitted to enter upon his duties and to enjoy the rights, privileges and immunities granted by this treaty.

ARTICLE XVIII. Consular officers, nationals of the state by which they are appointed, shall be exempt from arrest except when charged with the commission of offenses locally designated as crimes other than misdemeanors and subjecting the individual guilty thereof to punishment. Such officers shall be exempt from military billetings, and from service of any military or naval, administrative or police character whatsoever.

In criminal cases the attendance at the trial by a consular officer as a witness may be demanded by the prosecution or defense. The demand shall be made with all possible regard for the consular dignity and the duties of the office; and there shall be compliance on the part of the consular officer.

Consular officers shall be subject to the jurisdiction of the courts in the state which receives them in civil cases, subject to the proviso, however, that when the officer is a national of the state which appoints him and is engaged in no private occupation for gain, his testimony shall be taken orally or in writing at his residence or office and with due regard for his convenience. The officer should, however, voluntarily give his testimony at the trial whenever it is possible to do so without serious interference with his official duties.

ARTICLE XIX. Consular officers, including employees in a consulate, nationals of the State by which they are appointed other than those engaged in private occupations for gain within the State where they exercise their functions shall be exempt from all taxes, National, State, Provincial, and Municipal, levied upon their persons or upon their property, except taxes levied on account of the possession or ownership of immovable property situated in, or income derived from property of any kind situated or belonging within the territories of the State within which they exercise their functions. All consular officers and employees, nationals of the State appointing them shall be exempt from the payment of taxes on the salary, fees or wages received by them in compensation for their consular services.

Lands and buildings situated in the territories of either High Con-

tracting Party, of which the other High Contracting Party is the legal or equitable owner and which are used exclusively for governmental purposes by that owner, shall be exempt from taxation of every kind, National, State, Provincial and Municipal, other than assessments levied for services or local public improvements by which the premises are benefited.

ARTICLE XX. Consular officers may place over the outer door of their respective offices the arms of their State with an appropriate inscription designating the official office. Such officers may also hoist the flag of their country on their offices including those situated in the capitals of the two countries. They may likewise hoist such flag over any boat or vessel employed in the exercise of the consular function.

The consular offices and archives shall at all times be inviolable. They shall under no circumstances be subjected to invasion by any authorities of any character within the country where such offices are located. Nor shall the authorities under any pretext make any examination or seizure of papers or other property deposited within a consular office. Consular offices shall not be used as places of asylum. No consular officer shall be required to produce official archives in court or testify as to their contents.

Upon the death, incapacity, or absence of a consular officer having no subordinate consular officer at his post, secretaries or chancellors, whose official character may have previously been made known to the government of the State where the consular function was exercised, may temporarily exercise the consular function of the deceased or incapacitated or absent consular officer; and while so acting shall enjoy all the rights, prerogatives and immunities granted to the incumbent.

ARTICLE XXI. Consular officers, nationals of the State by which they are appointed, may, within their respective consular districts, address the authorities, National, State, Provincial or Municipal, for the purpose of protecting their countrymen in the enjoyment of their rights accruing by treaty or otherwise. Complaint may be made for the infraction of those rights. Failure upon the part of the proper authorities to grant redress or to accord protection may justify interposition through the diplomatic channel, and in the absence of a diplomatic representative, a consul general or the consular officer stationed at the capital may apply directly to the government of the country.

ARTICLE XXII. Consular officers may, in pursuance of the laws of their own country, take, at any appropriate place within their respective districts, the depositions of any occupants of vessels of their own country, or of any national of, or of any person having permanent residence within the territories of, their own country. Such officers may draw up, attest, certify and authenticate unilateral acts, deeds, and testamentary dispositions of their countrymen, and also contracts to which a countryman is a party. They may

draw up, attest, certify and authenticate written instruments of any kind purporting to express or embody the conveyance or encumbrance of property of any kind within the territory of the State by which such officers are appointed, and unilateral acts, deeds, testamentary dispositions and contracts relating to property situated, or business to be transacted, within the territories of the State by which they are appointed, embracing unilateral acts, deeds, testamentary dispositions or agreements executed solely by nationals of the State within which such officers exercise their functions.

Instruments and documents thus executed and copies and translations thereof, when duly authenticated under his official seal by the consular officer shall be received as evidence in the territories of the contracting parties as original documents or authenticated copies, as the case may be, and shall have the same force and effect as if drawn by and executed before a notary or other public officer duly authorized in the country by which the consular officer was appointed; provided, always that such documents shall have been drawn and executed in conformity to the laws and regulations of the country where they are designed to take effect.

ARTICLE XXIII. A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit.

When an act committed on board of a private vessel under the flag of the State by which the consular officer has been appointed and within the territorial waters of the State to which he has been appointed constitutes a crime according to the laws of that State, subjecting the person guilty thereof to punishment as a criminal, the consular officer shall not exercise jurisdiction except in so far as he is permitted to do so by the local law.

A consular officer may freely invoke the assistance of the local police authorities in any matter pertaining to the maintenance of internal order on board of a vessel under the flag of his country within the territorial waters of the State to which he is appointed, and upon such a request the requisite assistance shall be given.

A consular officer may appear with the officers and crews of vessels under the flag of his country before the judicial authorities of the State to which he is appointed to render assistance as an interpreter or agent.

ARTICLE XXIV. In case of the death of a national of either High Contracting Party in the territory of the other without having in the territory of his decease any known heirs or testamentary executors by him appointed,

the competent local authorities shall at once inform the nearest consular officer of the State of which the deceased was a national of the fact of his death, in order that necessary information may be forwarded to the parties interested.

In case of the death of a national of either of the High Contracting Parties without will or testament, in the territory of the other High Contracting Party, the consular officer of the State of which the deceased was a national and within whose district the deceased made his home at the time of death, shall, so far as the laws of the country permit and pending the appointment of an administrator and until letters of administration have been granted, be deemed qualified to take charge of the property left by the decedent for the preservation and protection of the same. Such consular officer shall have the right to be appointed as administrator within the discretion of a tribunal or other agency controlling the administration of estates provided the laws of the place where the estate is administered so permit.

Whenever a consular officer accepts the office of administrator of the estate of a deceased countryman, he subjects himself as such to the jurisdiction of the tribunal or other agency making the appointment for all necessary purposes to the same extent as a national of the country where he was appointed.

ARTICLE XXV. A consular officer of either High Contracting Party may in behalf of his non-resident countrymen receipt for their distributive shares derived from estates in process of probate or accruing under the provisions of so-called Workmen's Compensation Laws or other like statutes provided he remit any funds so received through the appropriate agencies of his Government to the proper distributees, and provided further that he furnish to the authority or agency making distribution through him reasonable evidence of such remission.

ARTICLE XXVI. A consular officer of either High Contracting Party shall have the right to inspect within the ports of the other High Contracting Party within his consular district, the private vessels of any flag destined or about to clear for ports of the country appointing him in order to observe the sanitary conditions and measures taken on board such vessels, and to be enabled thereby to execute intelligently bills of health and other documents required by the laws of his country, and to inform his Government concerning the extent to which its sanitary regulations have been observed at ports of departure by vessels destined to its ports, with a view to facilitating entry of such vessels therein.

ARTICLE XXVII. Each of the High Contracting Parties agrees to permit the entry free of all duty and without examination of any kind, of all furniture, equipment and supplies intended for official use in the consular

offices of the other, and to extend to such consular officers of the other and their families and suites as are its nationals, the privilege of entry free of duty of their baggage and all other personal property, whether accompanying the officer to his post or imported at any time during his incumbency thereof; provided, nevertheless, that no article, the importation of which is prohibited by the law of either of the High Contracting Parties, may be brought into its territories.

It is understood, however, that this privilege shall not be extended to consular officers who are engaged in any private occupation for gain in the countries to which they are accredited, save with respect to governmental supplies.

ARTICLE XXVIII. All proceedings relative to the salvage of vessels of either High Contracting Party wrecked upon the coasts of the other shall be directed by the consular officer of the country to which the vessel belongs and within whose district the wreck may have occurred. Pending the arrival of such officer, who shall be immediately informed of the occurrence, the local authorities shall take all necessary measures for the protection of persons and the preservation of wrecked property. The local authorities shall not otherwise interfere than for the maintenance of order, the protection of the interests of the salvors, if these do not belong to the crews that have been wrecked, and to carry into effect the arrangements made for the entry and exportation of the merchandise saved. It is understood that such merchandise is not to be subjected to any customhouse charges, unless it be intended for consumption in the country where the wreck may have taken place.

The intervention of the local authorities in these different cases shall occasion no expense of any kind, except such as may be caused by the operations of salvage and the preservation of the goods saved, together with such as would be incurred under similar circumstances by vessels of the nation.

ARTICLE XXIX. Subject to any limitation or exception hereinabove set forth, or hereafter to be agreed upon, the territories of the High Contracting Parties to which the provisions of this Treaty extend shall be understood to comprise all areas of land, water, and air over which the Parties respectively claim and exercise dominion as sovereign thereof, except the Panama Canal Zone; for purposes connected with customs administration the territory of Germany shall be deemed to be co-terminous with the area included within the German customs lines.

ARTICLE XXX. Nothing in the present Treaty shall be construed to limit or restrict in any way the rights, privileges and advantages accorded to the United States or its nationals or to Germany or its nationals, by the

Treaty between the United States and Germany restoring friendly relations, concluded on August 25, 1921.¹ . . .

§ 88. CONSULAR IMMUNITY: CRIMINAL

Bigelow v. Princess Zizianoff

FRANCE, COURT OF APPEAL OF PARIS, 1928

Gazette du Palais, May 4, 1928 (No. 125); English text from
23 *American Journal of International Law* (1929), 172 ff.

President, M. Fortin

Mr. Bigelow, director of the Passport Service at the American Consulate General in Paris, has appealed from the judgment of the Correctional Tribunal of the Seine (12th Chamber) of April 5, 1927, which declared itself competent in a prosecution of him for defamation.

Attorney General Reynaud submitted the following conclusions:
Gentlemen,

I. Princess Zizianoff, who had requested a visa of her passport in order to go to the United States, met with a refusal by the consulate, against which she had protested. Consul Bigelow, in order to explain the decision of his government, had, in the course of an interview in his office, furnished representatives of the press information concerning Princess Zizianoff which was reproduced in an American newspaper placed on sale in Paris, the *Boston Sunday Post*, where may be read in the issue of September 5, 1926, under the signature Robert Johnson, an article of which the essential sentences are as follows:

Did Beauty Spy on U. S.? Princess Zizianoff is an international spy. She worked for the Germans in Russia during the World War and was deported to Siberia when she was caught. She was sent to America by Zinovieff last year to do espionage work among the American patriotic organizations, and her anti-Bolshevik activity was only a blind. In the past week she has twice secretly visited the Soviet embassy in Paris.

In consequence of this article, Princess Zizianoff cited before the 12th Correctional Tribunal of the Seine for abusive language and libel Mr. Kahn, Paris representative of the said newspaper, two other collaborators, and also Mr. Bigelow, the latter as an accomplice, for having furnished the elements of the article.

Mr. Bigelow, having denied the competence of the French court, was overruled by the court, which declared itself competent in respect to him.

¹ See Irvin Stewart, "American Treaty Provisions Relating to Consular Privileges and Immunities," 20 *A.J.I.L.* (1926), 81-102.—Ed.

Appeal was entered against this judgment.

Two arguments are invoked in support of the contention of incompetence:

The first is drawn from the text of the convention of February 23, 1853, between France and the United States.

The second is based upon the general principles of public law and international law, which prohibit, even in the absence of any convention, citing a foreign consul before the courts of the country where he performs his duties for acts done in the performance of those duties.

II. On the first point the defense maintains that French tribunals have no jurisdiction over consuls of the United States both by reason of the provisions of the Consular Convention of February 23, 1853, between France and the United States, and those of the Consular Convention of January 7, 1876, between France and Greece, applicable to consuls of the United States in virtue of the most-favored-nation clause in the former convention.

The convention with the United States is in these terms:

The consuls-general, consuls, vice-consuls or consular agents of the United States and France, shall enjoy in the two countries the privileges usually accorded to their offices, such as personal immunity, except in the case of crime. . . . If, however, the said consuls-general, consuls, vice-consuls or consular agents, are citizens of the country in which they reside; if they are, or become, owners of property there, or engage in commerce, they shall be subject to the same taxes and imposts, and with the reservation of the treatment granted to commercial agents, to the same jurisdiction, as other citizens of the country who are owners of property, or merchants.

The expression "personal immunity" should be understood in the sense of general immunity from jurisdiction, and this rule of immunity from jurisdiction is to be found repeated and made definite in the text of the convention of January 7, 1876, between France and Greece as follows:

Consuls-general, consuls, student consuls, chancellors, and vice-consuls, or consular pupils, if citizens of the state appointing them, shall enjoy personal immunity; they cannot be arrested or imprisoned except for actions which the penal legislation of the country of their residence defines as crimes and punishes as such; if they are in business, physical constraint can be applied to them only for acts done in business.

This exemption from arrest and imprisonment would have as its indispensable corollary immunity from jurisdiction, for it would be inconceivable that the judiciary should be limited to delivering purely theoretical sentences whose execution would be legally impossible. The French courts

would therefore be under the obligation of declaring themselves incompetent save in case of crime, limiting themselves to applying provisions whose definiteness and clearness preclude any controversy. And thus no question would be raised against the uncontested principle that courts can in no case decide, from the international legal point of view, the meaning or scope of international conventions. There would be here no construction or interpretation, but a mere application of a distinct rule.

This first line of argument cannot be accepted. In public law it belongs to each state to interpret international conventions and its interpretation is final for courts under its sovereignty. A French court is bound by the sovereign opinion of the state in the name of which it renders justice. This opinion is a categorical command for the judge. The principle of the separation of powers requires it so.

Now, the French Government has made known its opinion in the case of the prosecution of Consul King, of the United States, and this opinion is to be found in a judgment of the Criminal Chamber of the Court of Cassation of February 23, 1912 (*Gaz. Pal.* 1912. I. 454—*Bull. crim.* n. III, p. 189). It is summed up in this brief formula: "The personal immunity granted to consuls by the convention does not exclude the competence of our courts in penal matters," and the letter addressed by the Minister of Foreign Affairs on October 26, 1926, to M^e Thomas Olivera, *huissier* at Paris, confirms this doctrine by referring to the above-mentioned judgment.

This interpretation of the 1853 convention, to which the French courts ought to conform, is moreover the most reasonable one, and the arguments of the opposing thesis are by no means decisive. The expression "personal immunity" has different meanings, and to give it the meaning of immunity from jurisdiction would be an arbitrary assertion.

The exemption from arrest and imprisonment contemplated by the convention between France and Greece has to do in a general way in treaties only with preliminary detention. Thus it is in the consular convention of November 19/December 2, 1902, between the United States and Greece (*Rec. intern. des traités du XX^e Siècle*, p. 346), which mentions "preliminary arrest," and in the convention of August 21, 1911, between Belgium and Bolivia (*Rev. de droit internat. pr. et public*, 1913, p. 612), which provides for the case of persons preliminarily arrested.

The provision which would prohibit the arrest of a consul in virtue of a judgment would, moreover, be illusory, for the government of the state where the foreign consul resides would undoubtedly have the right, by reason of the conviction, to withdraw the exequatur from such consul and treat him thereafter as a mere individual in order to subject him to the penalty pronounced upon him.

On the other hand, a singular contradiction appears in the plan of the defense: It is argued at first that the convention of 1853, being clear and precise, the courts do not have to interpret it, which is evidently not within their jurisdiction, but that they have the undoubted right to apply it, and thereafter that a disagreement exists between the French Government and the Government of the United States with regard to the meaning and scope of the convention as to what concerns jurisdiction over consuls.

The proof that the provision lacks clearness and precision results from the disagreement itself. And in case of disagreement, the French Government alone is qualified to interpret, without being otherwise bound by the contrary opinion of a co-contracting state, which can denounce a treaty whose application is not in conformity with its own views. Contrary to an ill-founded claim of the defense, the interpretation of a consular convention has no need of being bilateral. So the court will not take time, as the tribunal did, in attempting to establish that the two governments were in agreement on the principle, since the existence of this agreement is not necessary.

It is objected finally that neither the decision of the Court of Cassation of February 23, 1912 (the King Case) nor of the Minister of Foreign Affairs, whose interpretation is quoted in that decision, fixes the status of the Franco-Grecian convention of January 7, 1876, by which the consuls of the United States should benefit in virtue of the most-favored-nation clause in the convention of 1853 between France and the United States.

But this silence is easily explained and we have in advance answered this observation by remarking that the arrest and imprisonment of consuls which the Franco-Grecian convention prohibits should be understood in the sense of preliminary detention. The convention does not at all grant to consuls immunity from jurisdiction, and it adds absolutely nothing to the provisions of that which was concluded in 1853 between France and the United States.

III. The second argument, called subsidiary in the pleadings, should likewise be rejected.

A consul, the defense tells us, cannot be prosecuted even in the absence of any diplomatic convention before the judicial tribunals for acts done in his official capacity, nor even for misdeeds committed in the exercise of his functions. Now Mr. Bigelow was well within his functions when he explained the reasons which had led his government to refuse the visa requested by Princess Zizianoff. It is even added that he was performing an act proper to his functions when in his office, being charged with relations with the press, he issued a communiqué or gave an interview. Moreover, that is the opinion which has been stated in this matter by the Government of the United States.

Thus, Gentlemen, the classic question of responsibility of public functionaries is before you. In what case does one find oneself in presence of an official act? In what case, on the other hand, can a personal act involving responsibility of the official before the ordinary tribunals be found? "If the injurious act is impersonal," writes Laferrière, "if it discloses an administrator, a mandatory of the state more or less subject to error, and not man with his feebleness, passions, and imprudences, the act remains administrative and cannot be brought before the courts. If, on the contrary, the personality of the agent is disclosed by acts in violation of law, by violence, or fraud, then the fault is chargeable to the functionary, not to his office. The act loses its administrative character and is no longer an obstacle to judicial cognizance." (Laferrière, *Tr. de juridiction administrative*, 2^e éd., t. I, p. 648.)

"A gross mistake," he further says, "manifest usurpation, an inexcusable attack upon private rights, or even a serious fault as opposed to a mere administrative inaccuracy, may justify cognizance by the courts." Conclusions in the Laumonnier-Corrial (*Trib. conflits* 5 Mai 1877, D. 78. 3. 13.)

Likewise in M. Gaston Jèze's opinion, there is a personal fault "if the wrong committed consists in a serious error which by reason of his position the functionary should not be excused for having committed": G. Jèze (*Rev. droit public*, 1909, p. 263, 268 *et suiv.*; *Les principes généraux du droit administratif*, 2^e sect., p. 59, note 3, *et* p. 60, note 2); Duguit (*Tr. de droit constitutionnel*, t. III, p. 280.)

The criterion therefore should be sought in the element of intent and it is necessary to scrutinize the agent's intentions. Often the personal fault will consist in a sort of deceit, but it is necessary clearly to point out that jurisprudence follows doctrine on this point and does not limit the responsibility of officials to actions that are defined as deceit. There are faults which raise a presumption of deceit, and we often find in decrees the expression "serious fault amounting to deceit."

As M. Berthélemy says, "serious blunders, inexcusable negligence, committed without malice, can be deemed to be personal faults."

It is thus that legal analysis permits one to discover, either in external actions or in the official act itself, a circumstance which is detachable either physically or mentally and which will be a constituent of the personal fault. This fault will be found to be isolated from the official act, it will have an existence of its own and will be like a legal entity so that the tribunals can take cognizance of it without having to go into any examination or consideration of official acts.

When it is a matter of external actions discrimination is simple. It is thus that a mayor performs an official act when he causes to be posted at his office a corrected table of the electoral list, even with an indication of the

reason for curtailing it. (*Trib. conflits* 26 juin 1897. D. 99. 3. 66.) But he commits a personal act, a separate one, when he does not confine himself to such publicity provided by the instructions received by him and causes it to be announced in the streets that such or such elector has been dropped rightfully from the electoral list because he has become a bankrupt. (*Trib. conflits* 4 décembre 1897. D. 99. 3. 93.)

Here the act which constitutes the fault, the making public in the street, which no legislative provision or rule provides for or authorizes, is materially distinct from the administrative act which consists in the official publication of the list at the mayor's office.

But it happens also that the act constituting the fault may be included in the official act, as is shown by the two following cases decided in the courts.

A teacher is not responsible for the poor quality of his teaching, nor for literary or historical mistakes, but he commits a personal fault if he delivers himself of anti-militaristic remarks or if he attacks accepted beliefs: (*Trib. conflits* 2 juin 1908. D. 1908. 3. 57).

Another example: A mayor has the church bells rung for a civil burial; this act, evidently administrative, may include a personal fault, especially if the step has been taken in the absence of any local usage authorizing it. Such a step is inspired by motives foreign to the desire for good administration, and the intention which is revealed is a circumstance detached from the administrative act. Consequently, the judicial tribunals are competent. (*Trib. conflits* 22 avril et 4 juin 1909. D. 1911. 3. 41.)

Therefore the remarks imputed to Mr. Bigelow, remarks made after the refusal of a visa of the passport of Madam Zizianoff, appear quite materially distinct from the administrative act.

But even admit that they were made in the course of an official consular act, the relations with the press and the response to interviews being considered as essentially official attributions of consular agents. The alleged defamation will be found included in the act, but the personal fault will result from a serious unskillfulness susceptible of injuring private interests, a circumstance clearly detachable from the administrative act. The judgment to be rendered will not require in this case, according to a formula of a decision of the Supreme Court, "either consideration or examination of any administrative act": (*Cass. crim.* 13 juillet 1889. D. 90. 1. 330).

The tribunal will limit itself to examining whether the constituted elements of the offences of insult and defamation are found united. The principle of the separation of powers will not be involved.

This appears to be a sound legal view. Moreover, French courts can not be bound by the opinion of the Government of the United States, which thinks that Consul Bigelow has acted within the scope of his duties,

and they should apply the principles of French law. Neither the high consideration attaching to the viewpoint of a foreign authority, nor the traditions of the most perfect courtesy can have the consequence of subordinating the decision of our magistrates to this manner of viewing the subject.

In these conditions you will therefore doubtless hold that the jurisdiction of the Correctional Tribunal of the Seine with regard to Consul Bigelow is certain, and you will confirm the order of the judgment under appeal.

In conformity with the above argument, the court has rendered the following decree:

The Court,

Whereas, the defendant contends that the judges of first instance were in error in declaring themselves competent, on the ground, first, that they placed an incorrect interpretation upon the convention of February 23, 1853, of which Article 2, paragraph 1, conferring personal immunity upon American consular agents, did not permit a valid summons of Mr. Bigelow before the French tribunal, and, secondly, subsidiarily, even if it was proper to interpret the 1853 convention in the sense adopted by the judgment appealed from, Bigelow, having acted in his capacity as consul in the discharge of his duties, could not in any case be subject to the French tribunals for the act he is charged with, and to decide the contrary would be trespass upon the sovereignty of a foreign government;

But, whereas there is no need of deciding upon the principal arguments of Bigelow, the government, which alone is qualified to interpret diplomatic conventions, having previously made known its opinion with regard to the meaning which should be given to the provisions of the convention of February 23, 1853, and especially to the words "personal immunity"; and it appears from a decision of the Court of Cassation of February 23, 1912 (*Bull. crim.* n. 111, p. 189—*Gaz. Pal.* 1912. I. 454), mentioned in the judgment appealed from, that this sentence concerning consular agents should be understood not as an immunity from personal jurisdiction in criminal matters, but only as an exemption from preliminary arrest and detention; and whereas the convention of 1853 has been neither modified nor denounced, this interpretation is obligatory upon the courts in virtue of the principle of separation of powers, and has even been repeated and confirmed as it appears from a letter from the Minister for Foreign Affairs dated October 26, 1926, addressed to the *huissier* Olivera, and produced at the hearing; and consequently, without there being need for making decisions on the other points raised and especially on that relating to the alleged secret documents, the present decision dealing only with the Cassation decision of 1912 and the letter mentioned, all imma-

terial points remaining undecided, the result is a declaration that the judges below have properly rejected the principal arguments of Bigelow;

Whereas, with regard to the subsidiary arguments, the judges below likewise acted justly in not entertaining them; referring to the conversations as charged in the original complaint, which tend to accuse Princess Zizianoff of having acted as a spy in Russia for the Germans, of having even been deported on that account, and of having later been a spy among the American patriotic societies for the Soviet Government, whose embassy she visited in Paris, we cannot discover a performance of an official act in the holding of such conversations;

Whereas, moreover, as the judgment below declares, the defendant is prosecuted, not for refusal of a passport, which would be an act in his consular capacity and would consequently be outside any jurisdiction of the courts, but only for having, in his communication of that decision of his country, delivered himself on the subject of said refusal of the above-described comments, which were not its necessary and indispensable corollary; and as in these comments, viewed as apart from or included in the official act itself, there is a serious wrong susceptible of injuring private interests and having a personal character; and this wrong, which is clearly unconnected with the duty performed by Bigelow and is not at all required in the examination of the said official act, would, if it is established, involve him in penal liability by reason of the criminal elements which it appears to contain;

For these reasons, and those of the judges below not inconsistent therewith;

And declaring that there is no legal reason for acceding to the requests of Bigelow, the present decision, dealing only with the documents already in evidence, confirms the judgment below in its declaration of jurisdiction over the suit brought at the request of the civil party;

Consequently rejects the contentions of Bigelow on appeal as ill-founded;

Condemns Bigelow to the costs of the appeal. . . .

M. Reynaud, Attorney General.—M^{es} Rosenmark and de Moro-Giafferi, Attorneys.

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QUESTIONS AND PROBLEMS

Students are urged to read all the materials in the chapter before attempting to answer the questions and problems.

1. What is the general character of the *Convention on Diplomatic Officers* reprinted as § 80? How does this differ from the character of the Harvard Draft

Convention, excerpts from which are printed in the footnotes? Does the Havana Convention purport to state the whole of international law on the subject with which it deals? Explain. If some question should arise between ratifying States not covered in the Convention, how would it be regulated? Do you think that the Convention can be taken as expressing accepted international law as far as it goes?

Does the Convention regard diplomatic officers as representing personal sovereigns? States? Governments? In this respect is its attitude similar to that expressed in the rules of the Congress of Vienna? (See § 81, page 499). Explain. What is the difference, according to the Convention, between ordinary and extraordinary diplomatic officers? What are the principal sources from which a diplomatic officer derives his authority?

2. What is the nature of the materials printed in § 81? Is the United States a party to the Protocols adopted at the Congresses of Vienna and of Aix-la-Chapelle in 1815 and 1818? What is the significance of the inclusion of the texts of portions of these Protocols in the *Instructions to Diplomatic Officers of the United States*? Are these *Instructions* international law?

Can you suggest the "inconveniences" arising from "claims of precedence among diplomatic agents" which led to the adoption of the seven rules of the Congress of Vienna? How do the rules, taken as a whole, tend to obviate these "inconveniences"? Does the *Convention on Diplomatic Officers* adopted at Havana in 1928 (§ 80) alter these rules in any way?

What are the classes of diplomatic agents distinguished in the Vienna rules? What is the basis on which these distinctions are made? What is meant by the statement that only Ambassadors, legates, or nuncios have the "representative character"? How would it be determined whether a given diplomatic officer fell within one or another of the several classes? To whom and by whom would an ambassador be accredited? A minister plenipotentiary? A chargé d'affaires? A legate? A nuncio? A minister resident?

How is precedence within each class determined? What is the reason for this rule?

Do you suppose these rules apply to consular agents? Explain.

To whom would diplomatic agents sent by other States to the United States be accredited? Would this conform in the strict sense to the rules of Vienna and Aix-la-Chapelle? Explain.

Are questions of precedence such as these mere foolishness or do they have importance? Can you suggest occasions on which these rules might be of considerable consequence?

3. Discuss *Magdalena Steam Navigation Co. v. Martin* (§ 83).

4. How would the following situation be dealt with according to international law?

(a) The minister of State A accredited to State B, a prohibition country desires to import intoxicating liquors, to consume them, and serve them to his guests on the premises of the legation, and to consume and serve them to friends off these premises.

(b) The son of a clerk in the legation desires the same privileges.

5. The Ambassador of State C to State B is killed in an automobile accident. State C desires to continue diplomatic representation with as little interruption as possible. What should be done?

6. Russia desires to appoint as military attaché to its embassy in Great Britain a gentleman who has published a book, one chapter of which is entitled "England: the Putrescence of Capitalism." Is there any ground for objection? Discuss.

7. The British Ambassador to Germany makes a speech in 1935 to a group of British businessmen in Berlin, which he later has printed and circulated widely in Germany. In this speech he declares: "Freedom of speech, freedom of the press, freedom from religious and racial intolerance, and government by legislatures freely elected by the people: these are the indispensable marks of any society which presumes to call itself civilized." Is any action by Germany justified?

8. State X has its agents tamper with diplomatic dispatches sent by the Minister of State Y in State X to his home government. These dispatches disclose that State Y is supporting financially and with advice the Yellow Shirts, a political group planning to overthrow the Government of State X. Can State Y take any action?

Would it make any difference if the Yellow Shirts planned only to capture the Government of State X at the polls?

9. How would the following situations be dealt with according to international law?

(a) A pickpocket being pursued by a policeman in Washington jumps over the wall into the grounds of the Japanese Embassy.

(b) Sun Yat-sen was kidnapped in London and held prisoner in the Chinese Legation there because he was agitating for the overthrow of the existing Government of China.

(c) The butler of the legation of State X in Washington is charged with bigamy. Would it make any difference if he was a Siamese national? A national of State X? A citizen of the United States?

10. What can American authorities legally do in the following cases:

(a) The Ambassador of State A, late for an appointment with the President of the United States, is driven from Annapolis to the White House one Saturday afternoon at 80 miles per hour.

(b) The son of the chargé d'affaires of State B in Washington is attending Yale. On his way home from a party he is responsible for an automobile accident in which two persons are killed.

(c) Naval attachés of States X and Y are the only witnesses to a duel in which one of the participants is killed. Subpoenaed by a court, they decline to testify on grounds of their diplomatic immunity.

(d) The Peace Association pickets the legation of State C, a totalitarian State, in Washington.

11. What are the rights of the parties in the following cases:

(a) The Minister of State X to the United States buys a farm in Connecticut for use as a summer residence, financing the purchase in part by a first mortgage on the property. He fails to meet the payments and the mortgagee institutes foreclosure proceedings.

(b) The Secretary of the Z legation in Washington refuses to pay his gas bill.

12. The X Ambassador orders a large quantity of cigarettes for use in Embassy entertainments. When the bill is sent, he refuses to pay that portion of it attributable to United States excise taxes.

13. The Minister of State X receives a property tax statement relative to the legation property in Washington embracing the following items: (1) tax for general purposes; (2) school tax; (3) parks and playgrounds tax; (4) special tax for relief; (5) tax to establish a municipal electric light and power plant; (6) assessment for installation of lighting fixtures on the street on which the legation fronts; (7) charge for snow removal from the legation sidewalk. Which, if any, of the items should be paid?

14. The Ambassador of State Q has income from the following sources: (1) salary from State Q; (2) expense allowances from State Q; (3) dividends from stock in the U. S. Steel Corporation; (4) interest on bonds of a German corporation; (5) profits from sale of Massachusetts real estate; (6) fees from lectures. Can the United States collect income tax on this income or any item of it?

Suppose all except items (1) and (2) were not the Ambassador's, but his wife's. Could the United States collect income tax on the wife's income or any item of it?

15. (a) State L maintains a Trade Delegation in the United States, the Chief of which is accredited to the President. The Trade Delegation rents the fifth floor of a Washington office building as its quarters. Representatives of a Senate committee investigating subversive activities in the United States raid these quarters and discover in the files evidence that agents of State L are promoting a mutiny in the American Navy. What action can American authorities legally take?

(b) Would the situation be any different if State L, maintaining a regular diplomatic and consular establishment in the United States, had incorporated in addition, under the laws of New Jersey, a Commerce Corporation, whose offices were raided with the same results?

16. The chargé d'affaires of State P in the United States is subpoenaed as a witness in a civil suit. He appears and testifies, but when certain material questions are unexpectedly asked he first refuses to answer and then pleads diplomatic immunity.

17. Discuss the difference between diplomatic and consular officers in the light of *In re Baiz* (§ 85). Are there any other differences?

18. In § 87 are reprinted parts of a treaty providing for the reciprocal reception of consular officers by the United States and Germany. In the absence of such a treaty as this, would the United States be under obligation to receive consular officers from Germany? Explain. In the absence of a treaty especially providing for it, would Germany be obliged under international law to receive a diplomatic representative from the United States? Explain.

19. Is a consular officer an official of the sending State or the receiving State or both? Explain. What is an *exequatur*? Explain. Does a diplomatic officer require an *exequatur*? Is there any difference between an *exequatur* and a *letter of credence*?

20. What is the effect of a "most favored nation" clause in a consular convention?

21. You are an American citizen resident in Germany. List the different ways in which the consular officers of the United States in Germany might be useful to you.

22. What relations between American diplomatic officers and American consular officers in Germany are envisioned in the treaty between the United States and Germany (§ 87)?

23. Do consular officers of Germany in the United States have to be German nationals? American citizens?

24. Mr. X is a State A national and Consul of State A in Milwaukee. What are his rights under the following circumstances:

(a) A wild party in the consulate disturbs the peace.

(b) Mr. X puts illegal slugs in the pay telephone in the consulate. He is also detected in the act of putting such slugs in the telephone at the corner drugstore.

(c) He beats up a gentleman who presents an anti-State A resolution from a local club.

(d) He embezzles funds which he is holding for relatives of a wealthy State A citizen who died in Milwaukee.

Would it make any difference in any of these cases if he were an American citizen? A national of Austria?

25. Mr. Pfund is a German national, and German Consul at Galveston. What are his rights in the following circumstances:

(a) The United States adopts universal military service, and Mr. Pfund receives a notice to present himself to the local Selective Service Board for examination.

(b) A German national is accused of murder, and his attorneys demand that Mr. Pfund be called as a character witness.

(c) In a suit over a promissory note, Mr. Pfund is served with a subpoena to appear personally in Court and bring with him certain specified documents in his possession.

(d) A deputy sheriff calls at the consulate armed with a search warrant describing certain papers on the consular premises, and states that he proposes to seize them.

Would it make any difference in any of these cases if Mr. Pfund were an American citizen?

26. What were the facts in the case of *Bigelow v. Princess Zizianoff* (§ 88)? What were the precise issues presented by these facts? What was the Court's judgment?

What were the provisions of the Treaty of 1853? How were they connected with the Convention of 1856? What were Bigelow's contentions with respect to the interpretation of these conventions? What was the Court's attitude? What does the Court mean by saying "... the interpretation of a consular convention has no need of being bilateral"? Do you agree? What was the effect of this theory in this case?

How did the argument of Bigelow as to the inviolability of his official acts differ from the argument based on the Conventions? Was this argument based

on French law? State Bigelow's argument as precisely as you can, and the Court's response to it.

Would the French courts have taken jurisdiction if Bigelow had merely refused the visa? If, though holding a press conference, Bigelow had declined to comment when questioned about refusing the visa? Would the truth of the statements of Bigelow have made any difference as far as can be discerned in the judgment of the Court?

What do you think of the Court's judgment?

X

International Agreements

§ 89. TREATIES: GENERAL

The instrument printed below is an important statement of the law of treaties actually in force between States. For a projected restatement strongly imbued with the spirit of reform, the student should consult the Draft Convention and Comment on The Law of Treaties of the Harvard Law School Research in International Law, printed in 29 *American Journal of International Law* (Supp., October, 1935).

Convention on Treaties

ADOPTED BY THE SIXTH INTERNATIONAL CONFERENCE OF AMERICAN
STATES AT HAVANA, FEBRUARY 20, 1928.¹

*Report of the Delegates of the United States of America to the
Sixth International Conference of American States, pp. 197-202.*

ARTICLE 1. Treaties will be concluded by the competent authorities of the States or by their representatives, according to their respective internal law.²

ARTICLE 2. The written form is an essential condition of treaties.

The confirmation, prorogation, renewal or continuance, shall also be in writing unless other stipulations have been made.³

¹ In August, 1939, the convention was in force for Brazil, Dominican Republic, Ecuador, Haiti, Nicaragua and Panama. The United States signed the Convention but did not ratify it, as was the case with a number of Central and South American States. No non-American State signed, ratified, or adhered to the convention.—Ed.

² See § 91, below.

The Harvard Law School Research in International Law (hereinafter cited as Harvard Research) in its Draft Convention on the Law of Treaties, says in ARTICLE 1: "As the term is used in this Convention: (a) A 'treaty' is a formal instrument of agreement by which two or more States establish or seek to establish a relation under international law between themselves. (b) The term 'treaty' does not include an agreement effected by exchange of notes. (c) The term 'treaty' does not include an instrument to which a person other than a State is or may be a party." 29 *A.J.I.L.* (Supp., October, 1935), 657. For Comment on this Article see pp. 686-703.—Ed.

³ Harvard Research Draft, ARTICLE 4: "The international juridical effect of a treaty is not dependent upon the name given to the instrument." The Comment states: "The names

ARTICLE 3. The authentic interpretation of treaties, when considered necessary by the contracting parties, shall likewise be in writing.⁴

ARTICLE 4. Treaties shall be published immediately after exchange of ratifications. The failure to discharge this international duty shall affect neither the force of treaties nor the fulfilment of obligations stipulated therein.⁵

ARTICLE 5. Treaties are obligatory only after ratification by the contracting states, even though this condition is not stipulated in the full powers of the negotiators or does not appear in the treaty itself.⁶

ARTICLE 6. Ratification must be unconditional and must embrace the entire treaty. It must be made in writing pursuant to the legislation of the state.

In case the ratifying state makes reservations to the treaty it shall become effective when the other contracting party informed of the reservations expressly accepts them, or having failed to reject them formally, should perform actions implying its acceptance.

In international treaties celebrated between different states, a reservation made by one of them in the act of ratification affects only the application

actually employed today for the designation of instruments comprised under the generic term treaties are already numerous, and in recent years there has been a marked tendency to multiply them and to employ them without discrimination and without regard to the rules of logic and consistency. In addition to the terms 'treaty' and 'convention,' which in earlier times were employed almost exclusively to designate the instruments which are considered as treaties today in the generic sense, there have come into use on a wide scale such terms as 'protocol,' 'agreement,' 'arrangement,' 'accord,' 'act,' 'general act,' 'declaration,' '*modus vivendi*,' 'statute,' 'regulations,' 'provisions,' 'pact,' 'covenant,' '*compromis*,' etc. In fact, the number of instruments designated by these terms is now in excess of those styled 'treaties' and 'conventions.'" Pp. 710-711; for further definition and discussion of these terms, see pp. 710-722. The Comment concludes: "The names which conferences choose to give to the instruments recording their engagements, signify little or nothing. It is not the label but the character of the instrument, and especially its object or purpose, and the nature of the relationship which it establishes, that is of significance." P. 722.—Ed.

⁴ See below, § 95.—Ed.

⁵ ARTICLE 18, Covenant of the League of Nations: "Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it." See *League of Nations Treaty Series*. The Harvard Draft Convention on the Law of Treaties requires (Art. 17) in addition that treaties, even of nonmembers, be either registered with or communicated with the Secretariat, or published, in order to be binding. See the Comment on this Article in Harvard Research, *loc. cit.* On a few occasions the World Court has given effect to unregistered "treaties or engagements" to which League Members were parties: Series A, No. 2, p. 33; *Polish Postal Service in Danzig*, *Idem*, Series B, No. 11.—Ed.

⁶ As to ratification, this is the prevailing view: see Articles 6-8 of the Harvard Research Draft. Article 8 of this Draft provides: "The signature of a treaty on behalf of a State does not create for that State an obligation to ratify." This view is still objected to in some quarters, which hold that signature by a duly authorized agent is sufficient to bind the State. See C. Fairman, "Competence to Bind the State," 30 *A.J.L.L.* (1936), 439. The Harvard Research defines ratification as "an act by which the provisions of the treaty are formally confirmed and approved by a State." (Art. 6 [a].) In the United States, ratification is by the President, not by the Senate, which only advises and consents to ratification. See below, § 91.—Ed.

of the clause in question in the relation of the other contracting states with the state making the reservation.⁷

ARTICLE 7. Refusal to ratify or the formulation of a reservation are acts inherent in national sovereignty and as such constitute the exercise of a right which violates no international stipulation or good form. In case of refusal it shall be communicated to the other contracting parties.⁶

ARTICLE 8. Treaties shall become effective from the date of exchange or deposit of ratification, unless some other date has been agreed upon through an express provision.⁸

ARTICLE 9. The acceptance or the non-acceptance of provisions in a treaty, for the benefit of a third state which was not a contracting party, depends exclusively upon the latter's decision.

ARTICLE 10. No state can relieve itself of the obligations of a treaty or modify its stipulations except by the agreement, secured through peaceful means, of the other contracting parties.⁹

ARTICLE 11. Treaties shall continue in effect even though the internal constitution of the contracting states has been modified. If the organization of the state should be changed in such a manner as to render impossible the execution of treaties, because of division of territory or other like reasons, treaties shall be adapted to the new conditions.¹⁰

ARTICLE 12. Whenever a treaty becomes impossible of execution through the fault of the party entering into the obligation, or through circumstances which at the moment of concluding it were under control of this party and unknown to the other party, the former shall be responsible for damages resulting from its non-execution.¹¹

ARTICLE 13. The execution of a treaty may, through express stipulation

⁷ For additional materials on reservations, see Harvard Research Draft and Comment, Articles 13-16, *loc cit.*, 659-660.—Ed.

⁸ Judicial decisions in the United States hold, contrary to the prevailing doctrine, that ratification has a retroactive effect, causing the treaty to be effective from the date of signature. See *Haver v. Yaker*, below, § § 93, 94.—Ed.

⁹ In the Protocol of London, 1871, North Germany, Austria Hungary, Great Britain, Italy, Russia, and Turkey "recognize that it is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with consent of the Contracting Powers by means of an amicable arrangement." 61 British and Foreign State Papers, 1198. One of the purposes of the Covenant of the League of Nations is to secure a "scrupulous respect for all treaty obligations," although Article 19 authorizes the Assembly to advise "the reconsideration by Members of the League of treaties which have become inapplicable." Article 20 of the Harvard Research Draft: "A State is bound to carry out in good faith the obligations which it has assumed by a treaty (*pacta sunt servanda*)."¹⁰ This rule is obviously one of the foundation principles of international law, but the remark of Brierly should be borne in mind: "If international law insists too rigidly on the binding force of treaties, it will merely defeat its own purpose by encouraging their violation." *Law of Nations*, 2nd Ed. (1935), 202. Cf. Articles 12 and 14, and Note to Article 14.—Ed.

¹⁰ See *Terlinden v. Ames*, § 65 above.—Ed.

¹¹ See Note to Article 14.—Ed.

or by virtue of special agreement, be placed wholly or partly under the guaranty of one or more states.

The guarantor state can intervene in the execution of the treaty only by virtue of a request by one of the interested parties and then only under the conditions which were stipulated for intervention. When intervention takes place, only such measures may be employed by the guarantor state as are sanctioned by international law, and without requirements of greater scope than those of the state which has been guaranteed.

ARTICLE 14. Treaties cease to be effective:

- a) When the stipulated obligation has been fulfilled;
- b) When the length of time for which it was made has expired;
- c) When the resolutive condition has been fulfilled;
- d) By agreement between the parties;
- e) By renunciation of the party exclusively entitled to a benefit thereunder;
- f) By total or partial denunciation, if agreed upon;
- g) When it becomes incapable of execution.¹²

ARTICLE 15. The caducity of a treaty may also be declared when it is permanent and of non-continuous application, on condition that the causes which originated it have disappeared and when it may logically be deduced that they will not reappear in the future.

The contracting party invoking this caducity may, upon not obtaining the consent of the other party or parties, appeal to arbitration, the contracted obligation to remain in force if a favorable award is not obtained and while the decision is being made.¹³

¹² The Harvard Research Draft provides: "ARTICLE 33. (a) A treaty or any provision thereof may be terminated by agreement of the parties. (b) A treaty to which only two States are parties is terminated when one of the parties becomes extinct. (c) Subject to any provisions concerning its renewal or continuance contained in the treaty or agreed upon by the parties, a treaty concluded for a fixed period of time is terminated by the expiration of that period." The Comment lists other methods of termination often cited by writers: "1. Denunciation by one party, in the case of bipartite treaties"; this is admitted by the Harvard Research Draft (Article 34) "only when such denunciation is provided for in the treaty or consented to by all other parties. A denunciation must be in accordance with any conditions laid down in the treaty or agreed upon by the parties." "2. Renunciation by one party of its own rights under a bipartite treaty when the renouncing party owes no obligations to the other party." The Comment regards the consent of the other party as necessary in this case. "3. Impossibility of execution." The Comment states that "the most that can be said in such cases is that the obligation of performance is suspended during the period when performance is impossible. The treaty remains in existence, and the duty of performance revives as soon as the obstacle to its execution is removed." "4. The execution of the stipulations of the treaty." Authorities differ on this, but the Comment follows Oppenheim (*International Law*, 4th Ed., 1928, I, 744) in stating: "A treaty is not terminated by the execution of its stipulations; there may be no further obligations to perform under the treaty, but the treaty continues to exist nevertheless." Harvard Research, pp. 1161-1162, 1173.—Ed.

¹³ This Article represents an effort to conserve the benefits of the so-called principle of *rebus sic stantibus*, while guarding against its abuse by requiring submission to arbitration, and the maintenance of the treaty pending the award. Article 28 of the Harvard Research Draft is similar in principle, but permits provisional suspension by the objecting State pend-

ARTICLE 16. Obligations contracted in treaties shall be sanctioned in cases of noncompliance and when all diplomatic negotiations have been exhausted without success, by decision of a court of justice or an arbitral tribunal within the limits and according to the procedure in use at the time in which the infraction is alleged.

ARTICLE 17. Treaties whose denunciation may have been agreed upon and those establishing rules of international law, can be denounced only in the manner provided thereby.

In the absence of such a stipulation, a treaty may be denounced by any contracting state, which state shall notify the others of this decision, provided it has complied with all obligations covenanted therein.

In this event the treaty shall become ineffective, as far as the denouncing state is concerned, one year after the last notification, and will continue in force for any other signatory states, if any.¹⁴

ARTICLE 18. Two or more states may agree that their relations are to be governed by rules other than those established in general conventions celebrated by them with other states.

ing the arbitration. The Harvard Research definition of treaties to which the doctrine of *rebus sic stantibus* applies is more concise: "(a) A treaty entered into with reference to the existence of a state of facts the continued existence of which was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated, may be declared by a competent international tribunal to have ceased to be binding, in the sense of calling for further performance, when that state of facts has been essentially changed." From a perusal of some of the authorities, the editor is convinced that no meaning can be attached to the *clausula rebus sic stantibus* which could enlist anything like general agreement in a particular case. On the one hand, it is generally admitted that circumstances present at the time of the making of a treaty may so change as to require in justice that the State benefiting by the change should no longer be bound. Such a principle, moreover, may be essential to the preservation of peace. On the other hand, it is self-evident that any State wishing to free itself of onerous obligations has in this principle a weapon with which to accomplish the desired result. *Rebus sic stantibus* is notoriously the first legal refuge of States wishing to free themselves from treaty obligations incurred as the result of military defeat. Statements of the "essential circumstances" justifying the unilateral throwing off of treaty obligations illustrate both the value of the doctrine and its vulnerability to abuse. L. H. Woolsey's may be taken as an example: After saying that "only vital changes" could have the effect of terminating treaty obligations under the doctrine, "on account of the possibility of abuse by the contracting parties," he continues:

"Changes which are regarded by authorities as fundamental or vital are those which: take away the very foundation of the engagement, that is, its *raison d'être*; threaten or cause the sacrifice of a state's development or its vital requirements for political or economic existence to the execution of the treaty, that is, make performance impracticable except at an unreasonable sacrifice; are inconsistent with the right of self-preservation, or incompatible with the existence of the state; modify essentially the political relations which produced political treaties, as for example treaties of alliance; make a treaty really inapplicable, or actually impossible of fulfillment." "The Unilateral Termination of Treaties," 20 *A.J.I.L.* (1926), 349-350.

It is not at present international law, apart from specific obligations undertaken for the settlement of international disputes, that parties disagreeing on the construction of the *clausula rebus sic stantibus* are required to submit the question to arbitration. Both the Havana Convention on Treaties and the Harvard Research Draft represent new legislation in this respect. On the whole subject see Harvard Research, *loc. cit.*, 1096-1126; Judgment of World Court, *Free Zones of Upper Savoy and the District of Gex*, Publications, P.C.I.J., Series A/B, No. 46 (1932), and (arguments and documents) Series C, No. 58; and authorities there cited.—ED.

¹⁴ See Note to Article 14.—ED.

This precept applies not only to future treaties but also to those in effect at the time of concluding this convention.

ARTICLE 19. A state not participating in the making of a treaty may adhere to the same if none other of the contracting parties be opposed, its adherence to be communicated to all. The adherence shall be deemed final unless made with express reservation of ratification.

ARTICLE 20. The present convention does not affect obligations previously undertaken by contracting parties through international agreements. [Article 21, regarding ratifications, is omitted.]

§ 90. DURESS

NOTE BY THE EDITOR

One of the most criticized principles in international law is the rule that a treaty entered into as the result of coercion, military force, or war is nevertheless binding on both the defeated and the victorious parties. The modern trend in private jurisprudence is to regard as void "any transaction which the party seeking to avoid was not bound to enter into, if the party was coerced by fear of a wrongful act by the other party . . . the fact to be determined in each case is whether or not the party seeking to avoid his obligations under the contract really had a choice and exercised his will freely and without constraint."¹ But international law contains no rule that a treaty is void if entered into as a result of force or threat of force so that the defeated State could not in fact have a choice or exercise its will freely without constraint.

A rationale of the accepted view might be stated as follows: International law still permits the use of economic pressure, of force, and even of war, by States, in order to secure their rights. The use of these methods is therefore not necessarily unlawful. If, as a result of such methods, a defeated State is confronted by treaty terms unpalatable to it, it has not, merely because of the methods used, been brought into its situation by a wrongful act of its adversary; in private law, to avoid a contract, the duress must be unlawful. Moreover, the defeated State in practically all cases does have a choice: it may continue to resist, though resistance may be hopeless, and accept the consequences of its resistance. The fact that the choice between continuance of resistance and acceptance of the terms offered may be a hard one does not render it any the less a choice. Finally, in that the acceptance of the terms ends the hostilities, it brings about a state of peace and introduces order and certainty into the relations of the parties. If it could then be said that the treaty is not binding owing to the circumstances under

¹ Harvard Research, *loc. cit.*, p. 1152, paraphrasing Williston, *On Contracts*, Vol. III, §§ 1603 and 1608 ff.

which it was made, it would be impossible to bring about a legal end to conflicts, the relations between the parties would be made permanently uncertain, and a perpetual state of unrest, conflict, and war would be encouraged.

In recent years there has been a pronounced tendency of writers to object to this hard doctrine. For example, while admitting that treaties entered into under duress are still the law, Brierly says: "It is within our powers, when we are stating what the law is, to clear our minds of cant; and if we do so, we shall surely say that no shred of sanctity attaches to a treaty into which one party has been coerced, nor is good faith in the least engaged in its observance."² The premise of this objection is, as it almost necessarily must be, that some uses of force are illegal. If force is used in violation of the Covenant of the League of Nations, or the Kellogg Pact, or of specific obligations undertaken to settle disputes without the use of force, so runs the argument; then this use of force is unlawful. If it is unlawful, and successful, then a treaty entered into as a result of it by the defeated party gave him no free choice unhindered by unlawful acts, and the treaty is not binding. On the other hand, if the force used is legal—e. g., when it is authorized under the provisions of the League of Nations to be used against a recalcitrant State—and successful, then a treaty which the vanquished State is compelled to accept is binding. There is no duress because the force used is lawful.

A treaty is voidable when obtained by the use of force in the case where personal duress has been brought to bear on the negotiators. The persons of the negotiators cannot be coerced, according to this principle, though the State which they represent can. The Harvard Research embodies this principle in Article 32: "(a) As the term is used in this Convention, duress involves the employment of coercion directed against the persons signing a treaty on behalf of a State or against the persons engaged in ratifying or acceding to a treaty on behalf of a State; provided that, if the coercion has been directed against a person signing a treaty on behalf of a State and if with knowledge of this fact the treaty signed has later been ratified by that State without coercion, the treaty is not to be considered as having been entered into by that State in consequence of duress." A State making a claim of such duress may seek a declaration to that effect from an international tribunal, and suspend operation of the treaty until its award, which is binding.

QUERY: Under this principle, is the treaty of 1915 between the United States and Haiti voidable by Haiti? See § 128 below.

² "Some Considerations on the Obsolescence of Treaties," II *Transactions of the Grotius Society* (1926), 18-19.

§ 91. ARE TREATIES MADE BY CONSTITUTIONALLY INCOMPETENT AUTHORITIES INTERNATIONALLY BINDING?— AGREEMENT MAKING IN THE UNITED STATES

NOTE BY THE EDITOR

An important controversy exists on the question whether a treaty entered into by an authority incompetent under its constitutional law to bind the State establishes a binding international obligation towards the State with which the treaty is entered into. A widely held view is that since the second State is in no position to inquire into the question whether the constitutional law of the first State has been observed, it cannot look behind the instrument of ratification by the first State, which ordinarily certifies that its constitutional procedure has been carried out. Consequently, the first State is to be regarded as having contracted valid obligations internationally against the second State, even if internally the treaty was unconstitutionally entered into.¹

The Harvard Research, however, took the opposing view in its Draft, Article 21: "A State is not bound by a treaty made on its behalf by an organ or authority not competent under its law to conclude the treaty; however, a State may be responsible for an injury resulting to another State from reasonable reliance by the latter upon a representation that such organ or authority was competent to conclude the treaty." The question is especially interesting in the United States, where the strict constitutional process of treaty-making requiring the advice and consent of the Senate is being extensively supplemented in practice by international action by both houses of Congress (requiring only a simple majority in the Senate) and by executive agreements entered into by the President, either under authorization of Congress or a treaty previously entered into, or upon the President's sole authority without any action by either Senate or House of Representatives. It cannot be said that the constitutionality of any of these supplementary methods has been conclusively determined, though in *Altman v. U. S.* (1912), 224 U. S. 583, 601, the Supreme Court declared, relative to an executive agreement reached as a result of Congressional authorization, that "while it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, Sec. 3, was not a treaty possessing the dignity of one requiring ratification by the Senate . . . it was an international compact, negotiated between the representatives of two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was pro-

¹ See Harvard Research, *op. cit.*, pp. 992 ff.

claimed by the President. . . . We think that such a compact is a treaty under the Circuit Court of Appeals Act . . . ”

Treaties.—The Constitution of the United States provides that the President “shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur”; that “no State shall enter into any treaty, alliance, or confederation. . . .”; and that “no State shall, without the consent of Congress, . . . enter into any agreement or compact with another State or with a foreign power. . . .”

In practice, the President appoints agents who, in conference with the agents of foreign States, negotiate the terms of the treaty and sign it. The terms usually include a statement of the conditions under which the treaty is to become operative as between the contracting States, usually upon “exchange of ratifications.” The President then transmits the signed treaty to the Senate, the Senate as such having ordinarily no voice in the negotiation, though individual Senators have sometimes been appointed as negotiators. The function of the Senate is not to “ratify” the treaty, but to “advise and consent” to its ratification, after debate, and by a vote of two-thirds of the Senators present. When the Senate does thus “advise and consent” to ratification, the President ratifies the treaty by an instrument of ratification; but he may not do so constitutionally unless the Senate does “advise and consent.” The instrument of ratification contains a recital of the facts as to the negotiation and signature of the treaty; the text of the treaty; a statement that the Senate has advised and consented to it; and a statement by the President that he ratifies and confirms the treaty and every article thereof. The whole instrument is attested by the Secretary of State. The “exchange of ratifications” takes place when the President, through an accredited agent, delivers the ratification of the United States to the proper authorities in the other contracting State and receives in turn the duly authenticated ratification of that State. Then follows the Proclamation of the treaty by the President, from the date of which the treaty ordinarily becomes effective as respects rights of persons in the courts. In the *United States Treaty Series*, published by the Department of State, material published ordinarily is the Proclamation of the President, with a headnote in the following form: “Signed at Washington, November 18, 1903; ratification advised by the Senate, February 23, 1904; ratified by the President, February 25, 1904; ratified by Panama, December 2, 1903; ratifications exchanged at Washington, February 26, 1904; proclaimed, February 26, 1904.”² Proclamation by the President, however, may not necessarily be conclusive evidence that a treaty is in effect, *Factor v. Laubenheimer*, printed at page 509; and the statutes are silent as to the precise effect to be given the proclamation.³

² U.S.T.S., No. 431, taken as an example.

³ See H. Reiff, “Proclaiming of Treaties in the United States,” 30 *A.J.I.L.* (1936), 63

Executive agreements.—The President also makes, on his own authority, on the authority of the acts of Congress, and on the authority of treaties, what have become known as executive agreements, which are not submitted to the Senate at all. The extent to which such agreements may constitutionally take the place of treaties is not known.⁴ An Act of 1872 (*Rev. Stat.*, Sec. 398) authorizes the Postmaster General, by and with the advice and consent of the President, to negotiate and conclude postal treaties or conventions. Section 350 of the Reciprocal Trade Agreements Act, approved by the President June 12, 1934 (48 Stat. 943), authorized the President to negotiate trade agreements altering statutory tariffs by not more than 50 per cent. The President as Commander in Chief of the army may make agreements of a military character, but some agreements made by the President, unauthorized by statute or treaty and not submitted to the Senate, do not have this character. An example is the Lansing-Ishii Agreement embodied in an exchange of notes of November 2, 1917 (oddly enough published in *United States Treaty Series*, No. 630), in which the United States recognized the special interests of Japan in China, and both governments recognized the principle of the "open door" in that country. Executive agreements unauthorized by statute or treaty have also established United States control of customs houses in the Dominican Republic and Liberia. Apparently the internal force of such agreements in the United States rests solely on the constitutional power of a given President to conduct the administration in accord with the terms of the agreement, and the power of the President to make them is limited by his constitutional powers of performance. Thus it is said that while the President could make an agreement under which claims of American nationals against foreign States would be arbitrated, he could not make one under which foreign nationals' claims against the United States would be arbitrated, because in the latter case the President could not bind Congress to make the necessary appropriation.⁵ The *I'm Alone* claim against the United States was submitted to arbitration by executive agreement under the Treaty of 1924 (*United States Treaty Series*, No. 685). Whether a new President is bound is questionable (constitutionally), although the Lansing-Ishii Agreement was observed, until terminated in 1923, by a succeeding administration of a different party. Certainly the internal administration of an executive agreement may be terminated by an act of Congress, as the provisions of the Immigration Act of 1924 terminated the admission of Japanese into the United States, previously regulated under the "Gentlemen's Agreement" of 1907. Congress, however, may also terminate the internal operation of a treaty by the passage of a statute contrary thereto.⁶

⁴ See *Altman v. United States*, *loc. cit.*

⁵ See B. H. Williams, *American Diplomacy* (1926), pp. 443-444.

⁶ *Head Money Cases*, 112 U. S. 580 (1884), and see § 92 below.

The Constitution does not accord the House of Representatives any specific role in treaty-making, while it apparently distinguishes sharply the treaty-making and the statute-making powers. The House, however, on various occasions has sought to exercise control. Generally speaking, the House has been excluded from influence over the making of treaties, but the fact that bills appropriating money must receive the assent of the House in effect makes it impossible to execute treaties providing for payments of money by the United States without the passage of an appropriation to which the House assents. It is possible that, when the settlement of debts owed by European governments to the United States was under consideration, this position of the House led to another procedure by which the process of treaty-making was entirely avoided. An Act of Congress (42 Stat. 363) approved February 9, 1922, provided for a World War Foreign Debt Commission, headed by the Secretary of the Treasury, and empowered, subject to the approval of the President, "to refund or convert, and to extend the time of payment of the principal or interest, or both," of obligations of foreign governments held by the United States and arising out of the World War, into such other obligations of such governments "as shall be deemed for the best interests of the United States of America." Under Section 5 of the Act, the Commission "shall immediately submit to the Congress copies of any refunding agreements" thus entered into. The Commission's agreements were subsequently "authorized" or "authorized and approved" in each case by an Act of Congress.⁷ This procedure differed from that of other executive agreements in that the President was required to submit them to Congress. QUERY: Would these agreements have been constitutional if the Congress had refused its approval?

Joint resolutions.—Failing muster of the two-thirds majority of the Senate necessary to annex Texas by treaty, Texas was admitted to the Union by Joint Resolutions of Congress, which required only majorities in both houses.⁸ As Texas was an independent State at the time, it would seem that the House in this instance shared in what was in content an exercise of the treaty-making power. The potency of the Joint Resolution is further illustrated in a recent instance (48 Stat. 1182) in which a Joint Resolution authorized the President to accept membership for the United States in the International Labor Organization. The Senate voted unanimously to pass this Resolution, though the constitution of the International Labor Organization is Part XIII of the Treaty of Versailles, earlier rejected by the Senate. Could a majority of the two houses by a Joint Resolution authorize the President to accept membership for the United States in the League of

⁷ See *Combined Annual Reports of the World War Debt Funding Commission* (Washington, D. C., Government Printing Office, 1927).

⁸ 5 Stat. 797; 9 Stat. 108.

Nations, whose Covenant is Part I of the same treaty? The President accepted membership for the United States in the International Labor Organization as authorized, and "the Constitution of the International Labor Organization" was proclaimed and published by the President in the *United States Treaty Series*, No. 874, "to the end that every article and clause thereof may be observed by the United States of America and the citizens thereof."⁹

Is the United States internationally liable for obligations assumed towards other States through executive agreements, acts of Congress, and joint resolutions? It is clear in the case of a treaty that while a subsequent Act of Congress may supersede it (see *Whitney v. Robertson*, § 92 below), i. e., Congress may violate a treaty constitutionally, so far as its internal operation as law is concerned, the United States is still liable internationally to the other contracting State for the obligations assumed. There is no doubt that a State is internationally liable for acts of its legislature contravening treaty obligations.¹⁰ Under the rule of Article 21 of the Harvard Research Draft it seems clear that if international obligations contracted by the United States by joint resolution or executive agreement ultimately come to be regarded as constitutional, they establish a binding international obligation; if they are found to be unconstitutional, the United States will still be responsible internationally for injuries resulting to another contracting State from reasonable reliance upon the competence of Congress or the President to bind the United States. While court decisions on the constitutional validity of these methods remain in abeyance, their frequent use and the fact that the United States acts as if it were bound would seem to establish the international responsibility of the United States under them.

§ 92. TREATIES AND ACTS OF CONGRESS

Whitney v. Robertson

SUPREME COURT OF THE UNITED STATES, 1888

124 U. S. 190.

This was an action to recover back duties alleged to have been illegally exacted. Verdict for the defendant and judgment on the verdict. The plaintiffs sued out this writ of error. . . .

⁹ On the whole subject see the following recent publications of the Department of State: W. V. Whittington, "The Making of Treaties and International Agreements and the Work of the Treaty Division of the Department of State" (Publication 1174, 1938); Hunter Miller, "Treaties and the Constitution," *Press Releases*, January 23, 1937, p. 49; and F. B. Sayre, "How Trade Agreements Are Made" (Publication 1152, Commercial Policy Series 47 [1938]).

¹⁰ See Article 10, Havana Convention on Treaties, above; Harvard Research, *loc. cit.*, Articles 20, 27, and Comment thereon; and the World Court's Advisory Opinion in the *Polish Settlers' Case*, above § 72.

MR. JUSTICE FIELD delivered the opinion of the court.

The plaintiffs are merchants, doing business in the city of New York, and in August, 1882, they imported a large quantity of "centrifugal and molasses sugars," the produce and manufacture of the island of San Domingo. These goods were similar in kind to sugars produced in the Hawaiian Islands, which are admitted free of duty under the treaty with the king of those islands, and the act of Congress, passed to carry the treaty into effect. They were duly entered at the custom house at the port of New York, the plaintiffs claiming that by the treaty with the republic of San Domingo the goods should be admitted on the same terms, that is, free of duty, as similar articles, the produce and manufacture of the Hawaiian Islands. The defendant, who was at the time collector of the port, refused to allow this claim, treated the goods as dutiable articles under the acts of Congress, and exacted duties on them to the amount of \$21,936. The plaintiffs appealed from the collector's decision to the Secretary of the Treasury, by whom the appeal was denied. They then paid under protest the duties exacted, and brought the present action to recover the amount.

The complaint set forth the facts as to the importation of the goods, the claim of the plaintiffs that they should be admitted free of duty because like articles from the Hawaiian Islands were thus admitted, the refusal of the collector to allow the claim, the appeal from his decision to the Secretary of the Treasury and its denial by him, and the payment under protest of the duties exacted, and concluded with a prayer for judgment for the amount. The defendant demurred to the complaint, the demurrer was sustained, and final judgment was entered in his favor, to review which the case is brought here. . . .

The treaty with the king of the Hawaiian Islands provides for the importation into the United States, free of duty, of various articles, the produce and manufacture of those islands, in consideration, among other things, of like exemption from duty, on the importation into that country, of sundry specified articles which are the produce and manufacture of the United States. 19 Stat. 625. The language of the first two articles of the treaty, which recite the reciprocal engagements of the two countries, declares that they are made in consideration "of the rights and privileges" and "as an equivalent therefor," which one concedes to the others.

The plaintiffs rely for a like exemption of the sugars imported by them from San Domingo upon the 9th article of the treaty with the Dominican Republic, which is as follows: "No higher or other duty shall be imposed on the importation into the United States of any article the growth, produce, or manufacture of the Dominican Republic, or of her fisheries; and no higher or other duty shall be imposed on the importation into the Dominican Republic of any article the growth, produce, or manufacture of the

United States, or their fisheries, than are or shall be payable on the like articles the growth, produce, or manufacture of any other foreign country, or its fisheries." 15 Stat. 473, 478.

In *Bartram v. Robertson*, decided at the last term, (122 U. S. 116,) we held that brown and unrefined sugars, the produce and manufacture of the island of St. Croix, which is part of the dominions of the King of Denmark, were not exempt from duty by force of the treaty with that country, because similar goods from the Hawaiian Islands were thus exempt. The first article of the treaty with Denmark provided that the contracting parties should not grant "any particular favor" to other nations in respect to commerce and navigation, which should not immediately become common to the other party, who should "enjoy the same freely if the concession were freely made, and upon allowing the same compensation if the concession were conditional." 11 Stat. 719. The fourth article provided that no "higher or other duties" should be imposed by either party on the importation of any article which is its produce or manufacture, into the country of the other party, than is payable on like articles, being the produce or manufacture of any other foreign country. And we held in the case mentioned that "those stipulations, even if conceded to be self-executing by the way of a proviso or exception to the general law imposing the duties, do not cover concessions like those made to the Hawaiian Islands for a valuable consideration. They were pledges of the two contracting parties, the United States and the King of Denmark, to each other, that in the imposition of duties on goods imported into one of the countries which were the produce or manufacture of the other, there should be no discrimination against them in favor of goods of like character imported from any other country. They imposed an obligation upon both countries to avoid hostile legislation in that respect. But they were not intended to interfere with special arrangements with other countries founded upon a concession of special privileges."

The counsel for the plaintiffs meet this position by pointing to the omission in the treaty with the Republic of San Domingo of the provision as to free concessions, and concessions upon compensation, contending that the omission precludes any concession in respect of commerce and navigation by our government to another country, without that concession being at once extended to San Domingo. We do not think that the absence of this provision changes the obligations of the United States. The 9th article of the treaty with that republic, in the clause quoted, is substantially like the 4th article in the treaty with the King of Denmark. And as we said of the latter, we may say of the former, that it is a pledge of the contracting parties that there shall be no discriminating legislation against the importation of articles which are the growth, produce, or manufacture of their respective countries, in favor of articles of like character, imported from any

other country. It has no greater extent. It was never designed to prevent special concessions, upon sufficient considerations, touching the importation of specific articles into the country of the other. It would require the clearest language to justify a conclusion that our government intended to preclude itself from such engagements with other countries, which might in the future be of the highest importance to its interests.

But, independently of considerations of this nature, there is another and complete answer to the pretensions of the plaintiffs. The act of Congress under which the duties were collected authorized their exaction. It is of general application, making no exception in favor of goods of any country. It was passed after the treaty with the Dominican Republic, and, if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control. A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether. By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing. If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interest. The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance. . . . [The Court's discussion and approval of *Taylor v. Morton*, 2 Curtis, 454, 459, is omitted.]

. . . It follows, therefore, that when a law is clear in its provisions, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous treaty not already executed. Considerations of that character belong to another department of the government. The duty of the

courts is to construe and give effect to the latest expression of the sovereign will. In *Head Money Cases*, 112 U. S. 580, it was objected to an act of Congress that it violated provisions contained in treaties with foreign nations, but the court replied that so far as the provisions of the act were in conflict with any treaty, they must prevail in all the courts of the country; and, after a full and elaborate consideration of the subject, it held that "so far as a treaty made by the United States with any foreign nation can be the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal."

*Judgment affirmed.*¹

§ 93. WHEN DOES A TREATY COME INTO FORCE INTERNALLY?

Haver v. Yaker

SUPREME COURT OF THE UNITED STATES, 1869

9 Wallace (U. S.), 32.

Error to the Court of Appeals of Kentucky; the case being thus:

One Yaker, a Swiss by birth, who had come many years ago to the United States and become a naturalized citizen thereof, died in Kentucky in 1853, intestate, seized of real estate there. He left a widow, who was a resident and citizen of Kentucky, and certain heirs and next of kin, aliens and residents in Switzerland.

By the laws of Kentucky in force in 1853, the date of his death, aliens were not allowed to inherit real estate except under certain conditions, within which Yaker's heirs did not come, and if the matter was to depend on those laws, the widow was, by the laws then in force in Kentucky, plainly entitled to the estate.

However, in 1850, a treaty was "concluded and signed" by the respective plenipotentiaries of the two countries, between the Swiss Confederation and the United States [11 Stat. 587], upon the proper construction of which, as Yaker's heirs asserted—although the widow denied that the construction put upon the treaty by the heirs was a right one—these heirs were entitled

¹ In *United States v. Cook*, 288 U. S. 102 (1933) the question was whether the re-enactment in 1930 of the identical language in an Act of Congress of 1922, authorizing officers of the Coast Guard to search and seize vessels found within four marine leagues of the coast, had abrogated the treaty of 1924 between the United States and Great Britain, which permitted seizures of British vessels within one hour's steaming distance of the coast. It was held that the treaty had superseded the Act of 1922, but that the re-enactment in 1930 of the identical language in the Act of 1922 had not abrogated the treaty. "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed" (at p. 120).—Ed.

to take and hold the estate. The treaty provided by its terms that it should be submitted on both sides to the approval and ratification of the respective competent authorities of each contracting party, and that the ratifications should be exchanged at Washington as soon as circumstances should admit. It was so submitted, but was not duly ratified, nor were the respective ratifications exchanged in Washington till November 8, 1855, at which time the ratification and exchange was made. And on the next day the President, by proclamation—the treaty having been altered in the Senate—made the treaty public.

In 1859 the Swiss heirs, who had apparently not heard before of their kinsman's death, instituted proceedings to have the real estate of their kinsman, now in possession of the widow, assigned to them, and arguing that on a right construction of the treaty it was theirs.

But a preliminary question, and in case of one resolution of it, a conclusive objection to their claim was here raised; the question, namely, at what time the treaty of 1850-55, as it regarded private rights, became a law. Was it when it bore date, or was it only when the ratifications were exchanged between the parties to it? If not until it was ratified, then there was no necessity of deciding whether by its terms the heirs of Yaker had any just claim to this real estate, because in no aspect of the case could the treaty have a retroactive effect so as to defeat the title of the widow, which vested in her, by the law of Kentucky of 1853, on the death of her husband.

The Court of Appeals of Kentucky, where the heirs set up the treaty as a basis of their title, decided that it took effect only when ratified, and so deciding against their claim, the case was now here for review under the twenty-fifth section of the Judiciary Act (Act September 24, 1789, c. 20, 1 Stat. 85).

[Argument of counsel omitted.]

Mr. Justice Davis delivered the opinion of the court. It is undoubtedly true, as a principle of international law, that, as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date. Wheaton's *International Law*, by Dana, 336, bottom paging. But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications, and this we understand to have been decided by this court, in *Arredondo's Case*, reported in 6th Peters [749]. The reason of the rule is apparent. In this country, a treaty is something more than a contract, for the Federal Constitution

[article 6] declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it, as was done with the treaty under consideration. As the individual citizen, on whose rights of property it operates, has no means of knowing anything of it while before the Senate, it would be wrong in principle to hold him bound by it, as the law of the land, until it was ratified and proclaimed. And to construe the law, so as to make the ratification of the treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust, and cannot be sanctioned.

These views dispose of this case, and we are not required to determine whether this treaty, if it had become a law at an earlier date, would have secured the plaintiffs in error the interest which they claim in the real estate left by Yaker at his death.

Judgment affirmed.

§ 94. WHEN DOES A TREATY COME INTO FORCE INTERNALLY? (*Continued*)

NOTE BY THE EDITOR

The doctrine of *Haver v. Yaker* that, with the exception of provisions relating to private rights, the subsequent ratification of treaties causes them to come into effect from the date of signature, is the established doctrine of United States courts. The Harvard Research, after elaborate examination of the authorities and the jurisprudence, says that "this doctrine has found little support outside the United States" (p. 804), and later, that it "has no support today among writers on international law outside the United States, that it is not supported by the decisions of national courts in any country except the United States, and that there is little or no authority for it in the decisions of international tribunals" (p. 811). Consequently the Harvard Research adopted in Article 11 a rule directly contrary to that of *Haver v. Yaker*: "Unless otherwise provided in the treaty itself, a treaty which comes into force subsequently to the time of signature shall not be deemed to have effect as from the time of signature" (p. 799). This is the rule adopted in Article 8 of the Havana Convention on Treaties, above, page 461.¹

In the Harvard Research Draft, the principle of Article 11 is integrated with the detailed provisions concerning ratification. Article 7 in effect estab-

¹ For cases employing the same principle, see *The Eliza Ann* (1813) 1 Dodson, 244; *Kotzias v. Tyser* (1920) 2 K. B. 69; *Caminelli v. Capelli* (Italy, 1925) *Annual Digest*, 1925-1926, No. 256; *Iloilo Claims*, Nielsen's Report, American and British Claims Commission, 1926, p. 382.

lishes a rebuttable presumption that ratification is required in all cases. Article 8 states that a State is not obliged by the fact of its having signed a treaty, to ratify it. Article 9 provides: "Unless otherwise provided in the treaty itself, a State on behalf of which a treaty has been signed is under no duty to perform the obligations stipulated, prior to the coming into force of the treaty with respect to that State; under some circumstances, however, good faith may require that pending the coming into force of the treaty the State shall, for a reasonable time after signature, refrain from taking action which would render performance by any party of the obligations stipulated impossible or more difficult." And Article 10 prepares the way for Article 11 by explicit provisions about the date when a treaty comes into force: "Unless otherwise provided in the treaty itself, (a) A treaty which is not subject to ratification shall come into force upon signature. (b) A treaty which contains provision for exchange or deposit of ratifications shall come into force upon such exchange or deposit of ratifications by all the signatories. (c) A treaty which is subject to ratification but which contains no provision for exchange or deposit of ratifications, shall come into force when it is ratified by all the signatories and when each signatory has notified its ratification to all other signatories" (pp. 787 ff.).

No distinction appears to be made in the Draft, as between the date when the treaty becomes effective between the States concerned and that when it becomes effective with respect to private rights.

On the whole subject, see Harvard Research, *op. cit.*, especially pp. 799-812.

§ 95. CANONS OF INTERPRETATION OF TREATIES

A student who desires a more complete statement of the "canons" or "rules" of treaty interpretation may consult Vattel, *Law of Nations*, Chapter XVII. There are numerous statements of such rules. In actual cases controversies arise, not so much because any given rule is controverted as because different rules which are claimed to apply lead to different results. The document below is printed as one significant statement.

The Interpretation of Treaties

SEVENTH INTERNATIONAL CONFERENCE OF AMERICAN STATES, 1933

Seventh International Conference of American States, First, Second, and Eighth Committees, *Minutes and Antecedents*, pp. 168-169; as reprinted in 29 *American Journal of International Law* (Supp., October, 1935), 1225-1226.

The Third Sub-Committee of the Second Committee of the Seventh International Conference of American States drew up the following text concerning interpretation of treaties which, by a resolution of the Conference

of December 24, 1933, was submitted to study by the International Commission of American Jurists:

ARTICLE 1. In general, the rules governing the interpretation of domestic law are applicable to the interpretation of international conventions in so far as said rules are common to the legal system of the parties to the controversy.

ARTICLE 2. Of all interpretations, that which the parties have made together will be given preference.

ARTICLE 3. When the meaning of an international agreement is not clear from the text, the real will or purpose of the parties shall be sought from the preamble and from the diplomatic documents and protocols involved in the negotiation of the treaty.

ARTICLE 4. Treaties should be interpreted as demanded by reciprocal confidence and good faith, according to international usage. In case the real will of the parties cannot be determined, it will be understood that the parties have wished to adjust their stipulations in accordance with the established rules of International Law.

ARTICLE 5. The words of a treaty should be understood in their usual sense, except in cases in which such an interpretation would lead to results contrary to reason or to absurdities, or that it should not appear from the text of the treaty that a special technical meaning was given to them.

ARTICLE 6. The sense of one part of a treaty will be understood in relation with the rest of the convention.

ARTICLE 7. Even when a convention has been stipulated in general terms, it should be understood as having to do only with those matters upon which the parties have wished to agree.

ARTICLE 8. In order to establish the scope of an article, the acts of the contracting parties subsequent to the convention should be taken into account, in so far as they may be pertinent.

ARTICLE 9. The rules regarding the restrictive or extensive interpretation of the articles of a treaty can only be applied when ordinary methods of interpretation have failed.

ARTICLE 10. In case of doubt, treaties should be interpreted to give the benefit of the doubt to the States who are to fulfil an obligation.

ARTICLE 11. In case of a discrepancy between equally binding official copies of a treaty and when it is impossible to establish the purpose of the contracting parties, the restrictive interpretation which best harmonizes the texts will be adopted.

ARTICLE 12. In case there is no retroactive clause, the international conventions will be applied to the future. Save when otherwise provided, it will be considered that a treaty becomes effective from the date of the exchange of ratifications.

ARTICLE 13. Every question which refers to the interpretation of a treaty should, in the last instance, be submitted to arbitration.

When multilateral treaties are concerned the signatory States will be invited to take part in the arbitration, and the interpretation resulting will be obligatory for the States which have participated in the arbitration.

§ 96. TERMINATION OF TREATIES

Terlinden v. Ames

See above, § 65, page 320.

§ 97. TERMINATION OF TREATIES (*Continued*)

Charlton v. Kelly

SUPREME COURT OF THE UNITED STATES, 1913

229 U. S. 447.

Appeal from the Circuit Court of the United States for the District of New Jersey.

[Charlton, an American citizen, was arrested in New Jersey on complaint of the Italian Vice-Consul, who requested Charlton's surrender to Italy under the terms of the extradition treaty of 1868. The murder of which Charlton was accused had occurred in Italy. The Italian Penal Code prohibited the surrender of Italians who had committed offenses outside Italy, and provided for the trial of such offenses in Italy. Charlton contended that the obligations of an extradition treaty must be regarded as reciprocal, and that consequently Italy, in refusing to surrender its nationals for trial in the United States, had released the United States from any obligation to surrender its citizens to Italy to stand trial for offenses committed in Italy. Only so much of the case is printed as deals with this contention.]

MR. JUSTICE LURTON . . . delivered the opinion of the court. . . .

4. We come now to the contention that by the refusal of Italy to deliver up fugitives of Italian nationality, the treaty has thereby ceased to be of obligation on the United States. The attitude of Italy is indicated by its Penal Code of 1900 which forbids the extradition of citizens, and by the denial in two or more instances to recognize this obligation of the treaty as extending to its citizens. . . . [The examination by the Court of the diplomatic correspondence concerning Charlton is omitted.]

The attitude of the Italian Government indicated by proffering this request for extradition "in accordance with Article V of the Treaty of 1868" is . . . substantially this,—

First: That crimes committed by an American in a foreign country were not justiciable in the United States, and must, therefore, go unpunished unless the accused be delivered to the country wherein the crime was committed for trial.

Second: Such was not the case with Italy, since under the laws of Italy, crimes committed by its subjects in foreign lands were justiciable in Italy.

Third: That as a consequence of the difference in the municipal law, "it was logical that so far as parity in the matter of extraditing their respective citizens or subjects is concerned, each party should, in the absence of specific provisions in the Convention itself, be guided by the spirit of its own legislation."

This adherence to a view of the obligation of the treaty as not requiring one country to surrender its nationals while it did the other, presented a situation in which the United States might do either of two things, namely: abandon its own interpretation of the word "persons" as including citizens, or adhere to its own interpretation and surrender the appellant, although the obligation had, as to nationals, ceased to be reciprocal. The United States could not yield its own interpretation of the treaty, since that would have had the most serious consequence on five other treaties in which the word "persons" had been used in its ordinary meaning, as including *all persons*, and, therefore, not exempting citizens. If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which in its judgment had occurred and conform to its own obligation as if there had been no such breach. 1 Kent's Comm., p. 175.

Upon this subject Vattel, page 452, says:

"When the treaty of peace is violated by one of the contracting parties, the other has the option of either declaring the treaty null and void, or allowing it still to subsist; for a contract which contains reciprocal engagements, cannot be binding on him with respect to the party who on his side pays no regard to the same contract. But, if he chooses not to come to a rupture, the treaty remains valid and obligatory."

Grotius says (book 3, ch. 20, par. 38):

"It is honourable, and laudable to maintain a peace even after it has been violated by the other parties: as Scipio did, after the many treacherous acts of the Carthaginians. For no one can release himself from an obligation by acting contrary to his engagements. And though it may be further

said that the peace is broken by such an act, yet the breach ought to be taken in favour of the innocent party, if he thinks proper to avail himself of it."

In Moore's International Law Digest, Vol. 5, page 366, it is said:

"A treaty is primarily a compact between independent nations, and depends for the enforcement of its provisions on the honor and the interests of the governments which are parties to it. If these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce them. With this judicial tribunals have nothing to do."

In the case of *In re Thomas*, 12 Blatchf. 370, Mr Justice Blatchford (then District Judge) said:

"Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, without the consent of the United States. Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture."

In the case of *Terlinden v. Ames*, 184 U. S. 270, 287, the question was presented whether a treaty was a legal obligation if the state with whom it was made was without power to carry out its obligation. This court quoted with approval the language of Justice Blatchford, set out above, and said (p. 285):

"And without considering whether extinguished treaties can be renewed by tacit consent under our Constitution, we think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance."

That the political branch of the Government recognizes the treaty obligation as still existing is evidenced by its action in this case. In the memorandum giving the reasons of the Department of State for determining to surrender the appellant, after stating the difference between the two governments as to the interpretation of this clause of the treaty, Mr. Secretary Knox said:

"The question is now for the first time presented as to whether or not the United States is under obligation under treaty to surrender to Italy for trial and punishment citizens of the United States fugitive from the justice of Italy, notwithstanding the interpretation placed upon the treaty by Italy with reference to Italian subjects. In this connection it should be observed that the United States, although, as stated above, consistently contending that the Italian interpretation was not the proper one, has not treated the

Italian practice as a breach of the treaty obligation necessarily requiring abrogation, has not abrogated the treaty or taken any step looking thereto, and has, on the contrary, constantly regarded the treaty as in full force and effect and has answered the obligations imposed thereby and has invoked the rights therein granted. It should, moreover, be observed that even though the action of the Italian Government be regarded as a breach of the treaty, the treaty is binding until abrogated, and therefore the treaty not having been abrogated, its provisions are operative against us.

"The question would, therefore, appear to reduce itself to one of interpretation of the meaning of the treaty, the Government of the United States being now for the first time called upon to declare whether it regards the treaty as obliging it to surrender its citizens to Italy, notwithstanding Italy has not and insists it can not surrender its citizens to us. It should be observed, in the first place, that we have always insisted not only with reference to the Italian extradition treaty, but with reference to the other extradition treaties similarly phrased that the word 'persons' includes citizens. We are, therefore, committed to that interpretation. The fact that we have for reasons already given ceased generally to make requisition upon the Government of Italy for the surrender of Italian subjects under the treaty, would not require of necessity that we should, as a matter of logic or law, regard ourselves as free from the obligation of surrendering our citizens, we laboring under no such legal inhibition regarding surrender as operates against the Government of Italy. Therefore, since extradition treaties need not be reciprocal, even in the matter of the surrendering of citizens, it would seem entirely sound to consider ourselves as bound to surrender our citizens to Italy even though Italy should not, by reason of the provisions of her municipal law be able to surrender its citizens to us."

The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land and as affording authority for the warrant of extradition.¹

Judgment affirmed.

§ 98. EFFECT OF WAR ON TREATIES

Techt v. Hughes

See below, § 142, page 710.

¹ In *Valentine v. U. S. ex rel. Neidecker*, 299 U. S. 5 (1936) it was held under a treaty providing that "Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this Convention" and existing statutes, that the President did not have authority to surrender American citizens to France.—Ed.

§ 99. RECONSIDERATION OF TREATIES

a. Covenant of the League of Nations, Article 19

The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world.

b. Actions of League Organs

NOTE BY THE EDITOR

The Assembly has never advised such reconsideration. A Committee of Jurists made the following report on September 28, 1921:

The Committee of Jurists, assembled on the invitation of the General Committee of the Assembly, as a result of the request made by Bolivia, dated November 1, 1920, in order to give its opinion on the bearing of Article 19 of the Covenant, particularly regarding the powers of the Assembly as indicated in this article, is of opinion:

That, in its present form, the request of Bolivia is not in order, because the Assembly of the League of Nations can not of itself modify any treaty, the modification of treaties lying solely within the competence of the contracting States;

That the Covenant, while insisting on scrupulous respect for all treaty obligations in the dealings of organized people with one another, by Article 19 confers on the Assembly the power to advise (the French word in the Covenant is "inviter,"—that is to say "invite") the consideration by Members of the League of certain treaties or the consideration of certain international conditions;

That such advice can only be given in cases where treaties have become inapplicable—that is to say, when the state of affairs existing at the moment of their conclusion has subsequently undergone, either materially or morally, such radical changes that their application has ceased to be reasonably possible or in cases of the existence of international conditions whose continuance might endanger the peace of the world;

That the Assembly would have to ascertain, if a case arose, whether one of these conditions did in point of fact exist.¹

On September 25, 1925, the Assembly adopted the following Resolution:

The Assembly

Declares that a Member of the League may on its own responsibility, subject to the Rules of Procedure of the Assembly, place on the agenda of the Assembly the question whether the Assembly should give advice as contemplated by

¹ *Records of Plenary Meetings* (1921), League of Nations, p. 466.

Article 19 regarding the reconsideration of any treaty or treaties which such Member considers to have become inapplicable or the consideration of international conditions the continuance of which might, in its opinion, endanger the peace of the world;

Declares that, for an application of this kind to be entertained by the Assembly, it must be drawn up in appropriate terms, that is to say, in terms which are in conformity with Article 19;

And declares that, in the event of an application in such terms being placed upon the agenda of the Assembly, the Assembly shall in accordance with its ordinary procedure discuss this application, and if it thinks proper, give the advice requested.²

§ 100. MULTILATERAL TREATIES AS INTERNATIONAL LEGISLATION

International Legislation

BY MANLEY O. HUDSON

Reprinted from the *Encyclopedia of the Social Sciences*, VIII, 175-177, by permission of Judge Hudson and The Macmillan Company, publishers.

The term international legislation may be used in two senses: to describe the process by which changes are made in international law through lawmaking treaties or conventions and to refer to the results of that process which have been embodied in the content of international law. The term has not been in very common use in the past and is still somewhat novel. Indeed legislation as a means of developing international law has been much neglected until recent years. Few of the standard treatises deal with it. Many writers repeat that there is no international legislature, and some therefore deny that there is any international legislation. Yet it is now beginning to be appreciated that there is a process by which states can join together to change or add to the law governing their relations and that the multipartite treaties and conventions concluded during the last hundred years constitute an important part of the prevailing law.

The Congress of Vienna of 1815 may be taken to have inaugurated the process of international legislation. Although that conference was not convoked for any such purpose, advantage was taken of the opportunity afforded by the assembling of representatives of a number of states to formulate certain provisions of international law. The formulation took the shape of instruments binding only on the states parties to them; but these states were so influential and the formulations so desirable that some of them have come to be accepted as applicable to relations between all

² *Official Journal*, League of Nations (*Spec. Supp.*, 1929) No. 76, pp. 99-100.

states. A protocol of March 9, 1815, supplemented at the Congress of Aix-la-Chapelle in 1818,¹ served as the formulated law on the classification of diplomatic agents for a whole century and it still has influence. The Final Act of the Congress of Vienna established the principle of free navigation on the international rivers of Europe by the merchantmen of all states, and until the adoption of a new statute at Barcelona in 1921 it served as the basis of international river law. Similarly the Conference of Paris in 1856 formulated a declaration concerning the abolition of privateering² which has since been respected by belligerents not parties and which is firmly embedded in the existing law.

It was not until the middle of the nineteenth century, however, that conferences of state representatives began to be held to deal expressly with current international needs not filled by existing law. The revolution in international society wrought by improvements in methods of communication and transportation then called for international cooperation on a new scale. Problems had arisen for a solution of which traditional conceptions and practises offered no aid. Nothing short of continuous legislative activity would suffice. This was possible only through ad hoc international conferences, at which multipartite international conventions were adopted. Gradually these conferences became more frequent, more and more states sent representatives, forms tended toward some standardization and in time the importance of continuity came to be appreciated, with the result that various series of conferences were established. In some fields conferences continued to be convoked by single governments, which came to regard it as their prerogative to initiate action in those fields. For questions of maritime law the initiative was that of the Belgian government; for other maritime questions, that of the British government; for questions of private international law, that of the Dutch government. In some fields the responsibility was shared by all the states interested; and where administration during the intervals between conferences necessitated the maintenance of permanent offices, public international unions, such as the Universal Postal Union, were created. These unions established a periodicity in the holding of conferences and made possible cooperative and systematic preparation for international legislation in advance of the conferences themselves.

Such developments led inevitably toward a more general form of permanent international organization. The unions were the precursors of the League of Nations, which was established in 1920 "to promote international cooperation and to achieve international peace and security."³ The activities of the League of Nations have resulted in a great quickening of the process

¹ See § 81, above.—Ed.

² See § 180, below.—Ed.

³ See § 115, below.—Ed.

of international legislation. The sharing of responsibility for conferences has tended to displace the calling of conferences by single governments. Most of the older unions have continued their work, which has been greatly stimulated and in some cases facilitated by the work of organs of the League of Nations. In addition many new fields have been explored, many new forms have been developed and the importance of continuity has been more generally appreciated. The result is that attention is now being given to many subjects which had previously been outside the range of legislative consideration. Conferences have become more frequent; preparation for them has become more thorough, their procedure has produced fewer possibilities of friction, their legislative output has been greatly increased and conventional forms have become standardized. The League of Nations has ushered in a new era of legislative effort. The volume of international legislation produced during the twelve years from 1920 to 1932 exceeded that produced during the entire century which preceded 1914.

It is still true that there is no international parliament with authority to legislate for the world of states. The nearest approach to it is the Assembly of the League of Nations, which seldom adopts acts and which does not purport to legislate except with respect to the organization of the League itself. The International Labor Conference also has some of the characteristics of a legislative assembly. If there is no international legislature, it does not follow, however, that there is no international legislation. As long ago as 1907 John Bassett Moore could say that "of all the achievements of the past hundred years, the thing that is most remarkable, in the domain of international relations, has been the modification and improvement of international law by what may be called acts of international legislation." The history of the past quarter century has merely emphasized the truth of his statement.

Legislative progress has been particularly notable in certain fields. Legislation concerning telegraphic relations dates from the Paris Convention of 1865, which has been followed by numerous instruments; the St. Petersburg Convention of 1875 is still in force, but the regulations annexed to it were modified in 1925. The Universal Postal Union, organized under the Berne Convention of 1874, now comprises practically all the states of the world; periodic conferences have endeavored to keep the convention up to date, the latest having been held at Madrid in 1920, at Stockholm in 1924 and at London in 1929. For weights and measures the Paris Convention of 1875, modified in 1921, has served to create a common language for the whole world. Numerous conventions have dealt with the protection of industrial property, the latest general convention, which met in 1925, having been ratified by a large number of states; and with the protection of literary and artistic works, concerning which the Rome Convention of 1928 has

recently been brought into force. The conventions drawn up by the peace conferences at The Hague in 1899 and 1907,⁴ the various conventions on private international law representing the work of six conferences held at The Hague and the conventions on maritime law resulting from the work of the unofficial Comité Maritime International as completed by the diplomatic conferences held at Brussels are all excellent examples of the fruits of the legislative process. The six international conferences of American states, held between 1889 and 1928, have produced many legislative instruments, not all of which have been brought into force.

Since the World War the greater volume of legislative instruments has come from League of Nations conferences. The legislation effected by the Communications and Transit Organization of the League of Nations is notable. In a few instances legislative instruments have been promulgated for signature and ratification by the Assembly of the League of Nations, e. g. the Slavery Convention of 1926, the General Act for the Pacific Settlement of International Disputes of 1928 and the Convention for the Regulation of Whaling of 1931. More frequently, however, special conferences have been held; various conventions on the opium traffic, on traffic in women and children, on traffic in arms, on traffic in obscene publications, on road traffic, on buoyage and the lighting of coasts, on counterfeiting and on unification of laws of bills of exchange have been concluded in this way. In the field of labor legislation only two conventions had resulted from a whole generation of effort before 1914; since 1919 the International Labor conferences have adopted more than thirty labor conventions, which have been brought into force by various groups of states.

The technical problems which arise in international legislation are legion. Most of the work in international conferences is done by technical advisers sent by the various governments. The technical legal problems require close attention, although there is a tendency to follow more or less stock legal forms. The names given to instruments frequently carry little indication of their special character; an instrument may be called a treaty, a convention, a protocol, an act, a statute or by some other name. Signature is usually followed by ratification, and states which do not sign may be permitted to adhere or accede. Definitive acceptance of legislation has been greatly encouraged by the insistence of the Assembly of the League of Nations and by the work of the Secretariat of the League of Nations. The latter publishes periodical lists of signatures, ratifications, adhesions, denunciations and other acts relating to such acceptance. Problems of language, of reservation and of revision do not always receive uniform solution. Yet on the whole standards are developing which are being followed with remarkable regularity.

⁴ See §§ 114, 131, 140, 148, 154, 155, 157, 160, 161, 163, 167, 171.—Ed.

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QUESTIONS AND PROBLEMS

Students are urged to read all the materials in the chapter before attempting to deal with the questions and problems.

1. What is a treaty? Is it necessary for an international engagement to be called a treaty in order to bind the states concerned? What are some of the other names of binding international instruments?

2. What is the nature of the Convention on Treaties reprinted in § 89? Is it international law? Explain. Is its value as international law greater or less than that of the Harvard Research Draft Convention on the Law of Treaties? Explain.

3. By executive agreement, unauthorized by Congress, the President agrees that the United States will become a Member of the World Court. Is the United States bound internationally? Is it bound constitutionally? Explain your answer.

4. Suppose that, in 1920, the Senate had advised and consented to the ratification of the Treaty of Versailles with reservations, and that the President had ratified subject to these reservations. Would these reservations have been binding on the other States parties to the treaty? Explain your answer.

5. In 1938 several States announced that they did not regard Article XVI of the Covenant of the League of Nations (see page 565) as binding. Was this action in accord with international law?

6. State X, after a war in which it is defeated, is compelled to disarm and to withdraw its troops from a zone along its borders, under a treaty which it ratifies. Some twenty years later, State X rearms and reoccupies the zone with its troops. It justifies its action on the grounds (a) that the treaty was signed and ratified under compulsion; (b) that the essential factors in view of which the treaty was entered into had materially changed; (c) that other States party to the treaty had violated it. Discuss the questions involved from the point of view of international law.

7. States A and B ratify a treaty which A, though a Member of the League of Nations, does not register with the Secretariat. Later State B refuses to regard the treaty as binding because it has not been registered. The question whether the treaty is binding is submitted by agreement to the World Court. Decision and reasons?

8. The President negotiates a treaty on behalf of the United States with State Y and submits it to the Senate, which votes in its favor by a majority of four votes. The President ratifies the treaty and ratifications are exchanged with State Y. The provisions of the treaty are self-executing.

(a) A person affected by the treaty brings action to test its constitutionality in the courts. Decision, with reasons?

(b) A new President declares the treaty void, saying that it was unconstitutionally ratified by his predecessor. State Y claims that the treaty is valid, and by agreement the question is submitted to arbitration. Decision and reasons?

9. State C declares that the following treaties are of no effect for the stated reasons. Is State C correct?

(a) Treaty with State D according "most favored nation" treatment to State D's nationals in the territory of State C, because State D has been absorbed by State E. State E claims the treaty is still binding.

(b) Treaty with State F providing for the protection of game birds in certain boundary zones, because the game birds have entirely disappeared.

(c) Treaty with State G establishing a boundary, because according to its terms the treaty was to expire at the end of ten years, which have elapsed.

(d) Treaty with State H, because all the obligations stipulated on both sides have been fulfilled.

(e) Treaty with State I, the only stipulation of which was that State I was to pay State C \$100,000, because State C has decided it will waive the obligation.

(f) Treaty ceding the Island of Yip to State J 150 years previously, because the island has disappeared under the ocean.

(g) Treaty with fifty states relating to postal service, because one of the fifty has violated the treaty.

(h) Treaty with State K, terminable under its terms with six months' notice. State C declares the treaty terminated immediately.

10. What were the facts in the case of *Whitney v. Robertson* (§ 92)? What was the precise question which the court was called upon to decide? What was the judgment?

What two interpretations of the "most favored nation" clause were urged before the court? Which interpretation did the Court adopt? Why? Do you think the contrary interpretation might plausibly have been adopted?

Did the court regard its construction of the "most favored nation" clause as the decisive factor in the case? What relation did the Act of Congress bear to the treaty? If the court had adopted the other construction of the "most favored nation" clause, would the effect have been consistent with the provisions of the Act of Congress?

If the Act of Congress had been directly contrary to the provisions of the treaty however interpreted, would the court have given effect to the Act or to the treaty? Why? Would it make any difference whether the treaty or the Act had been enacted earlier? Explain.

What is the distinction between "self-executing" and other treaties? Was the treaty with Santo Domingo "self-executing"? Did this make any difference in the judgment of the court?

Did the judgment of the court settle the question of the construction of the treaty as between the United States and Santo Domingo? If the two States had submitted the question of treaty construction to arbitration, do you think that the tribunal would have reached the same decision? Would the judgment of the Supreme Court have bound the tribunal? What principles do you think the tribunal would have applied?

11. What were the facts in *Haver v. Yaker* (§ 93)? What was the precise question the court had to decide? What was its decision?

What was the state of the law of Kentucky with respect to inheritance of real estate by aliens? What were the provisions of the treaty with Switzerland? Could a treaty of the United States overrule a law of Kentucky? Explain. What would have been the case if the Kentucky law had been enacted after the treaty had taken effect? In the reasoning of the court, did the treaty go into effect on

one date, or on two dates? Explain. Why was the distinction important for the facts presented to the court?

Is the rule of *Haver v. Yaker* international law? Explain.

12. Enumerate as many of the rules for the interpretation of treaties as you can. Identify several cases you have studied involving the interpretation of treaties and tell what principles were applied. Do the same for a case assigned by your instructor.

13. What is meant by the phrase "international legislation"? How can there be such legislation without an international legislature? Give some instances of international legislation. Identify as many documents as you can in this book which embody international legislation. Consult any single volume of M. O. Hudson's *International Legislation* (1931—) and make a list of the subjects dealt with in international legislation in a single year. Pick out some one example, and study it in more detail.

XI

Extradition

§ 101. THE BASIS OF EXTRADITION

NOTE BY THE EDITOR

J. B. Moore, the leading American authority on extradition, says that "extradition may be defined as the delivery by a state of a person accused or convicted of a crime, to another state within whose territorial jurisdiction, actual or constructive, it was committed, and which asks for his surrender with a view to execute justice."¹ The most thorough recent discussion of extradition in English is that of the Draft Convention on Extradition, with Comment, by the Harvard Law School Research in International Law (C. K. Burdick, Reporter) printed in 29 *AJIL*. (Supp., January and April, 1935), hereinafter cited as Harvard Research. Article 1 defines extradition for purposes of the Draft Convention as "the formal surrender of a person by a State to another State for prosecution or punishment" (p. 21).

Although Chancellor Kent held in 1819 that "it is the law and usage of nations, resting on the plainest principles of justice and public utility, to deliver up offenders charged with felony and other high crimes, and fleeing from the country in which the crime was committed, into a foreign and friendly jurisdiction,"² the American and the more general practice today is to deliver up such offenders only as specifically provided in treaties of extradition.³ Nevertheless, some States deliver up a person requested in the absence of any treaty obligation to do so,⁴ and such a course is open to any State.

Modern extradition treaties fall into two general classes: (1) treaties

¹ *Extradition* (1890), I, § 1, 4.

² *In re Washburn* (N. Y.) 4 John Ch. 106, 8 Am. Dec. 548.

³ See *In re Rauscher*, below, page 507, and *Factor v. Laubenheimer*, § 107.

⁴ See *In re Doelitzsch* (Italy, 1923), *Annual Digest*, 1923-1924, No. 156.

in which extraditable offenses are specifically listed, of which the treaty of 1931 between the United States and Great Britain, printed below, § 102, is an example, and in which the lists of offenses tend to become uniform, and (2) treaties containing no list of offenses, but providing for extradition for acts punishable in both the State where the offense was committed and the State to which the offender has fled. Article 1 of the Montevideo Convention of 1933, in force April 1, 1939, as between Chile, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and the United States (with reservations), provides: "Each one of the signatory States . . . assumes the obligation of surrendering to any one of the States which may make the requisition, the persons who may be in their territory and who are accused or under sentence. This right may be claimed only under the following circumstances: (a) That the demanding State have the jurisdiction to try and to punish the delinquency which is attributed to the individual whom it desires to extradite. (b) That the act for which extradition is sought constitutes a crime and is punishable under the laws of the demanding and surrendering States with a minimum penalty of imprisonment for one year."⁵ The Harvard Research Draft follows this principle in its Article 2: "Except as otherwise provided in this Convention, a requested State shall extradite a person claimed, for an act (a) For which the law of the requesting State, in force when the act was committed, provides a possible penalty of death or deprivation of liberty for a period of two years or more; and (b) For which the law, in force in that part of the territory of the requested State in which the person claimed is apprehended, provides a possible penalty of death or deprivation of liberty for a period of two years or more, which would be applicable if the act were there committed" (p. 21). The Comment states: "From an international point of view the introduction of lists of indictable offenses into an ever-increasing number of bipartite treaties tends towards uncertainty and disorder, where effective coöperation is needed. The situation can hardly be other than chaotic when the practice of individual States varies without reason even with regard to the lists of offenses which they introduce into their own treaties" (p. 75). *

⁵ U.S.T.S., No. 882.

§ 102. AN EXTRADITION TREATY

Extradition Treaty, United States of America and Great Britain¹

SIGNED DECEMBER 22, 1931

United States Treaty Series, No. 849.

[Names of the signatories, preamble and names of plenipotentiaries are omitted.]

ARTICLE 1. The High Contracting Parties engage to deliver up to each other, under certain circumstances and conditions stated in the present Treaty, those persons who, being accused or convicted of any of the crimes or offences enumerated in Article 3, committed within the jurisdiction of the one Party, shall be found within the territory of the other Party.

ARTICLE 2. For the purposes of the present Treaty the territory of His Britannic Majesty shall be deemed to be Great Britain and Northern Ireland, the Channel Islands and the Isle of Man, and all parts of His Britannic Majesty's dominions overseas other than those enumerated in Article 14, together with the territories enumerated in Article 16 and any territories to which it may be extended under Article 17. It is understood that in respect of all territory of His Britannic Majesty as above defined other than Great Britain and Northern Ireland, the Channel Islands, and the Isle of Man, the present Treaty shall be applied so far as the laws permit.

For the purposes of the present Treaty the territory of the United States shall be deemed to be all territory wherever situated belonging to the United States, including its dependencies and all other territories under its exclusive administration or control.

ARTICLE 3. Extradition shall be reciprocally granted for the following crimes or offences:

1. Murder (including assassination, parricide, infanticide, poisoning), or attempt or conspiracy to murder.
2. Manslaughter.
3. Administering drugs or using instruments with intent to procure the miscarriage of women.
4. Rape.
5. Unlawful carnal knowledge, or any attempt to have unlawful carnal knowledge, of a girl under 16 years of age.
6. Indecent assault if such crime or offence be indictable in the place where the accused or convicted person is apprehended.

¹ For the unusual history of this treaty before it came into force, see *Factor v. Laubheimer*, § 107, below, at pages 516-518, and H. Reiff, "Proclaiming of Treaties in the United States," 30 *A.J.I.L.* (1936) 63.

7. Kidnapping or false imprisonment.

8. Child stealing, including abandoning, exposing or unlawfully detaining.

9. Abduction.

10. Procuration: that is to say the procuring or transporting of a woman or girl under age, even with her consent, for immoral purposes, or of a woman or girl over age, by fraud, threats, or compulsion, for such purposes with a view in either case to gratifying the passions of another person provided that such crime or offence is punishable by imprisonment for at least one year or by more severe punishment.

11. Bigamy.

12. Maliciously wounding or inflicting grievous bodily harm.

13. Threats, by letter or otherwise, with intent to extort money or other things of value.

14. Perjury, or subornation of perjury.

15. Arson.

16. Burglary or housebreaking, robbery with violence, larceny or embezzlement.

17. Fraud by a bailee, banker, agent, factor, trustee, director, member, or public officer of any company, or fraudulent conversion.

18. Obtaining money, valuable security, or goods, by false pretences; receiving any money, valuable security, or other property, knowing the same to have been stolen or unlawfully obtained.

19. (a) Counterfeiting or altering money, or bringing into circulation counterfeited or altered money.

(b) Knowingly and without lawful authority making or having in possession any instrument, tool, or engine adapted and intended for the counterfeiting of coin.

20. Forgery, or uttering what is forged.

21. Crimes or offences against bankruptcy law.

22. Bribery, defined to be the offering, giving or receiving of bribes.

23. Any malicious act done with intent to endanger the safety of any persons travelling or being upon a railway.

24. Crimes or offences or attempted crimes or offences in connection with the traffic in dangerous drugs.

25. Malicious injury to property, if such crime or offence be indictable.

26. (a) Piracy by the law of nations.

(b) Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

27. Dealing in slaves.

Extradition is also to be granted for participation in any of the aforesaid crimes or offences, provided that such participation be punishable by the laws of both High Contracting Parties.

ARTICLE 4. The extradition shall not take place if the person claimed has already been tried and discharged or punished, or is still under trial in the territories of the High Contracting Party applied to, for the crime or offence for which his extradition is demanded.

If the person claimed should be under examination or under punishment in the territories of the High Contracting Party applied to for any other crime or offence, his extradition shall be deferred until the conclusion of the trial and the full execution of any punishment awarded to him.

ARTICLE 5. The extradition shall not take place if, subsequently to the commission of the crime or offence or the institution of the penal prosecution or the conviction thereon, exemption from prosecution or punishment has been acquired by lapse of time, according to the laws of the High Contracting Party applying or applied to.

ARTICLE 6. A fugitive criminal shall not be surrendered if the crime or offence in respect of which his surrender is demanded is one of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for a crime or offence of a political character.

ARTICLE 7. A person surrendered can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place, until he has been restored, or has had an opportunity of returning, to the territories of the High Contracting Party by whom he has been surrendered.

This stipulation does not apply to crimes or offences committed after the extradition.

ARTICLE 8. The extradition of fugitive criminals under the provisions of this Treaty shall be carried out in the United States and in the territory of His Britannic Majesty respectively, in conformity with the laws regulating extradition for the time being in force in the territory from which the surrender of the fugitive criminal is claimed.

ARTICLE 9. The extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party applied to, either to justify the committal of the prisoner for trial, in case the crime or offence had been committed in the territory of such High Contracting Party, or to prove that the prisoner is the identical person convicted by the courts of the High Contracting Party who makes the requisition, and that the crime or offence of which he has been convicted is one

in respect of which extradition could, at the time of such conviction, have been granted by the High Contracting Party applied to.

ARTICLE 10. If the individual claimed by one of the High Contracting Parties in pursuance of the present Treaty should be also claimed by one or several other Powers on account of other crimes or offences committed within their respective jurisdictions, his extradition shall be granted to the Power whose claim is earliest in date, unless such claim is waived.

ARTICLE 11. If sufficient evidence for the extradition be not produced within two months from the date of the apprehension of the fugitive, or within such further time as the High Contracting Party applied to, or the proper tribunal of such High Contracting Party, shall direct, the fugitive shall be set at liberty.

ARTICLE 12. All articles seized which were in the possession of the person to be surrendered at the time of his apprehension, and any articles that may serve as a proof of the crime or offence shall be given up when the extradition takes place, in so far as this may be permitted by the law of the High Contracting Party granting the extradition.

ARTICLE 13. All expenses connected with the extradition shall be borne by the High Contracting Party making the application.

ARTICLE 14. His Britannic Majesty may accede to the present Treaty on behalf of any of his Dominions hereafter named—that is to say, the Dominion of Canada, the Commonwealth of Australia (including for this purpose Papua and Norfolk Island), the Dominion of New Zealand, the Union of South Africa, the Irish Free State, and Newfoundland—and India. Such accession shall be affected by a notice to that effect given by the appropriate diplomatic representative of His Majesty at Washington which shall specify the authority to which the requisition for the surrender of a fugitive criminal who has taken refuge in the Dominion concerned, or India, as the case may be, shall be addressed. From the date when such notice comes into effect the territory of the Dominion concerned or of India shall be deemed to be territory of His Britannic Majesty for the purposes of the present Treaty.

The requisition for the surrender of a fugitive criminal who has taken refuge in any of the above-mentioned Dominions or India, on behalf of which His Britannic Majesty has acceded, shall be made by the appropriate diplomatic or consular officer of the United States of America.

Either High Contracting Party may terminate this Treaty separately in respect of any of the above-mentioned Dominions or India. Such termination shall be effected by a notice given in accordance with the provisions of Article 18.

Any notice given under the first paragraph of this Article in respect of one of His Britannic Majesty's Dominions may include any territory in

respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, and which is being administered by the Government of the Dominion concerned; such territory shall, if so included, be deemed to be territory of His Britannic Majesty for the purposes of the present Treaty. Any notice given under the third paragraph of this Article shall be applicable to such mandated territory.

ARTICLE 15. The requisition for the surrender of a fugitive criminal who has taken refuge in any territory of His Britannic Majesty other than Great Britain and Northern Ireland, the Channel Islands, or the Isle of Man, or the Dominions or India mentioned in Article 14, shall be made to the Governor, or chief authority, of such territory by the appropriate consular officer of the United States of America.

Such requisition shall be dealt with by the competent authorities of such territory: provided, nevertheless, that if an order for the committal of the fugitive criminal to prison to await surrender shall be made, the said Governor or chief authority may, instead of issuing a warrant for the surrender of such fugitive, refer the matter to His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland.

ARTICLE 16. This Treaty shall apply in the same manner as if they were Possessions of His Britannic Majesty to the following British Protectorates, that is to say, the Bechuanaland Protectorate, Gambia Protectorate, Kenya Protectorate, Northern Rhodesia, Northern Territories of the Gold Coast, Nyasaland, Sierra Leone Protectorate, Solomon Islands Protectorate, Somaliland Protectorate, Swaziland, Uganda Protectorate and Zanzibar, and to the following territories in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, that is to say, Cameroons under British mandate, Togoland under British mandate, and the Tanganyika Territory.

ARTICLE 17. If after the signature of the present Treaty it is considered advisable to extend its provisions to any British Protectorates other than those mentioned in the preceding Article or to any British-protected State, or to any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, other than those mandated territories mentioned in Articles 14 and 16, the stipulations of Articles 14 and 15 shall be deemed to apply to such Protectorates or States or mandated territories from the date and in the manner prescribed in the notes to be exchanged for the purpose of effecting such extension.

ARTICLE 18. The present Treaty shall come into force ten days after its publication, in conformity with the forms prescribed by the laws of the High Contracting Parties. It may be terminated by either of the High

Contracting Parties by a notice not exceeding one year and not less than six months.

In the absence of an express provision to that effect, a notice given under the first paragraph of this Article shall not affect the operation of the Treaty as between the United States of America and any territory in respect of which notice of accession has been given under Article 14.

The present Treaty shall be ratified, and the ratifications shall be exchanged at London as soon as possible.

On the coming into force of the present treaty the provisions of Article 10 of the treaty of the 9th August, 1842, of the Convention of the 12th July, 1889, of the supplementary Convention of the 13th December, 1900, and of the supplementary Convention of the 12th April, 1905, relative to extradition, shall cease to have effect, save that in the case of each of the Dominions and India, mentioned in Article 14, those provisions shall remain in force until such Dominion or India shall have acceded to the present treaty in accordance with Article 14 or until replaced by other treaty arrangements.

[Names of signers are omitted.]

§ 103. INTERSTATE RENDITION

NOTE BY THE EDITOR

Section II of Article IV of the Constitution of the United States contains what is in effect a multilateral extradition treaty among the different States. "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." In operation this provision is much more complete than international extradition: (1) the phrase "or other crime" is much broader than the customary treaty list; (2) States usually give up their own citizens upon demand, while some nations do not (see § 97 above); (3) there is no rule preventing a State from trying an extradited person for a crime other than that for which he has been extradited (compare § 106, below). The Supreme Court, however, will not compel the executive authority of a State to deliver up a person extraditable under the Constitution,¹ and there is no other machinery for the enforcement of this obligation. The desire for reciprocity generally induces the State governors to observe their constitutional obligations, but there are occasional instances in which this is not effective. "Rendition" is the term now generally used to describe interstate extradition.²

¹ *Kentucky v. Dennison* (1861), 24 Howard (U. S.), 66.

² See J. B. Moore, *Extradition and Interstate Rendition* (Boston, 1891).

§ 104. EXTRADITION PROCEDURE: FUGITIVES APPREHENDED IN THE UNITED STATES

Code of the Laws of the United States of America, in force
January 3, 1935. Title 18, Ch. 20.

Section 651. *Fugitives from foreign country.* Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, or commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, District, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made. (R. S. § 5270; June 6, 1900, c. 793, 31 Stat. 656).

R. S. § 5270 from Act Aug. 12, 1848, c. 167, § 1, 9 Stat. 302. . . .

Section 653. *Surrender of fugitive.* It shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly; and it shall be lawful for the person so authorized to hold such person in custody, and to take him to the territory of such foreign government, pursuant to such treaty. If the person so accused shall escape out of any custody to which he shall be committed, or to which he shall be delivered, it shall be lawful to retake such person in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall so escape, may be retaken on an escape. (R. S. § 5272)

From Act Aug. 12, 1848, c. 167, § 3, 9 Stat. 302.

Section 654. *Time allowed for extradition.* Whenever any person who is committed under this chapter or any treaty, to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, it shall be lawful for any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, to order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered. (R. S. § 5273)

From Act Aug. 12, 1848, c. 167, § 4, 9 Stat. 303.

Section 655. *Evidence on hearing.* In all cases where any depositions, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any extradition case under this chapter, such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any deposition, warrant, or other paper or copies thereof, so offered, are authenticated in the manner required. (R. S. § 5271; Aug. 3, 1882, c. 378, § 5, 22 Stat. 216.)

R. S. § 5271 from Act Aug. 12, 1848, c. 167, § 2, 9 Stat. 302; Act June 22, 1860, c. 184, 12 Stat. 84. . . .

Section 658. *Continuance of provisions limited.* The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force during the existence of any treaty of extradition with any foreign government, and no longer. (R. S. § 5274)

From Act Aug. 12, 1848, c. 167, § 5, 9 Stat. 303.

§ 105. EXTRADITION PROCEDURE: FUGITIVES BELIEVED TO BE WITHIN THE JURISDICTION OF FOREIGN STATES

The Memorandum here printed is a circular of the Department of State dealing with the procedure for seeking the extradition of persons who, being alleged to have committed offenses in the United States, are believed to be within the jurisdiction of a State with which the United States has an extradition treaty.

Memorandum Relative to Applications for the Extradition from Foreign Countries of Fugitives from Justice

As reprinted in 29 *American Journal of International Law*
(*Supp.*, January and April, 1935), 432-434.

DEPARTMENT OF STATE
Washington, September, 1921

Extradition will be asked only from a Government with which the United States has an extradition treaty, and only for an offense specified in the treaty.

All applications for requisitions should be addressed to the Secretary of State, accompanied by the necessary papers as herein stated. When extradition is sought for an offense within the jurisdiction of the State or Territorial courts, the application must come from the governor of the State or Territory. When the offense is against the United States, the application should come from the Attorney General.

In every application for a requisition it must be made to appear that one of the offenses enumerated in the extradition treaty between the United States and the Government from which extradition is sought has been committed within the jurisdiction of the United States, or of some one of the States or Territories, and that the person charged therewith is believed to have sought an asylum or has been found within the dominions of such foreign government.

The extradition treaties of the United States ordinarily provide that the surrender of a fugitive shall be granted only upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her commitment for trial if the crime or offense had been there committed.

If the person whose extradition is desired has been convicted of a crime or offense and escaped thereafter, a duly authenticated copy of the record of conviction and sentence of the court is ordinarily sufficient.

If the fugitive has not been convicted, but is merely charged with crime, a duly authenticated copy of the indictment or information, if any, and of the warrant of arrest and return thereto, accompanied by a copy of the evidence upon which the indictment was found, or the warrant of arrest issued, or by original depositions setting forth as fully as possible the circumstances of the crime, are usually necessary. Many of our treaties require the production of a duly authenticated copy of the warrant of arrest in this country; but an indictment, information, or warrant of arrest alone, without the accompanying proofs, is not ordinarily sufficient. It is desirable to make out as strong a case as possible, in order to meet the contingencies of the local requirements at the place of arrest.

If the extradition of the fugitive is sought for several offenses, copies of the several convictions, indictments, or informations and of the documents in support of each should be furnished.

Application for the extradition of a fugitive should state his full name, if known, and his alias, if any, the offense or offenses in the language of the treaty upon which his extradition is desired, and the full name of the person proposed for designation by the President to receive and convey the prisoner to the United States. It should also contain a statement to the effect that it is made solely for the purpose of bringing about the trial and punishment of the fugitive, and not for any private purpose, and that if the application is granted, the criminal proceedings will not be used for any private purpose.

Copies of the record of conviction, or of the indictment, or information, and of the warrant of arrest, and the other papers and documents going to make up the evidence are required by the department, in the first instance, as a basis for requesting the surrender of the fugitive, but chiefly in order that they may be duly authenticated under the seal of the department, so as to make them receivable as evidence where the fugitive is arrested upon the question of his surrender.

Copies of all papers going to make up the evidence, transmitted as herein required, including the record of conviction, or the indictment, or information, and the warrant of arrest, must be duly certified and then authenticated under the great seal of the State making the application or the seal of the Department of Justice, as the case may be; and this department will authenticate the seal of the State or of the Department of Justice. For example, if a deposition is made before a justice of the peace, the official character of the justice and his authority to administer oaths should be attested by the county clerk or other superior certifying officer; the certificate of the county clerk should be authenticated by the governor or secretary of state under the seal of the State, and the latter will be authenticated by this department. If there is but one authentication, it should plainly cover all the papers attached.

All of the papers herein required in the way of evidence must be transmitted in duplicate, one copy to be retained in the files of the department, and the other, duly authenticated by the Secretary of State, will be returned with the President's warrant, for the use of the agent who may be designated to receive the fugitive. As the governor of the State, or the Department of Justice, also ordinarily requires a copy, prosecuting attorneys should have all papers made in triplicate.

By the practice of some of the countries with which the United States has treaties, in order to entitle copies of depositions to be received in evidence the party producing them is required to declare under oath that

they are true copies of the original depositions. It is desirable, therefore, that such agent, either from a comparison of the copies with the originals or from having been present at the attestations of the copies, should be prepared to make such declaration. When the original depositions are forwarded, such declaration is not required.

Applications by telegraph or letter are frequently made to this department for its intervention to obtain the provisional arrest and detention of fugitives in foreign countries in advance of the presentation of the formal proofs upon which a demand for their extradition may be based. Such applications should state specifically the name of the fugitive, the offense with which he is charged, the circumstances of the crime as fully as possible, and a description and identification of the accused. It is always helpful to show that an indictment has been found or a warrant of arrest has been issued for the apprehension of the accused. In Great Britain the practice makes it essential that it shall appear that a warrant of arrest has been issued in this country.¹

Care should be taken to observe the provisions of the particular treaty under which extradition is sought, and to comply with any special provisions contained therein. The extradition treaties of the United States may be found in the several volumes of the Statutes at Large, and in the compilation entitled "Treaties, Conventions, International Acts, Protocols, and Agreements between the United States and Other Powers," issued in three volumes by the Government Printing Office. Copies of particular treaties will be furnished by the department upon application.

If the offense charged be a violation of a law of a State or Territory, the agent authorized by the President to receive the fugitive will be required to deliver him to the authorities of such State or Territory. If the offense charged be a violation of a law of the United States, the agent will be required to deliver the fugitive to the proper authorities of the United States for the judicial district having jurisdiction of the offense.

Where the requisition is made for an offense against the laws of a State or Territory, the expenses attending the apprehension and delivery of the fugitive must be borne by such State or Territory. Expenses of extradition are defrayed by the United States only when the offense is against its own laws.

A strict compliance with these requirements may save much delay and expense to the party seeking the extradition of a fugitive criminal.

¹ For fuller information with respect to procedure in cases of provisional arrest within British jurisdiction, see Department's memorandum of May, 1890.

§ 106. THE PRINCIPLE OF STRICT CONSTRUCTION— EXTRADITION OF NATIONALS

NOTE BY THE EDITOR

In *United States v. Rauscher*, the Supreme Court of the United States denied that a prisoner, having been extradited from Great Britain on a charge of murder, could be indicted for a different offense, that of inflicting cruel and unusual punishment, without first being afforded an opportunity to return to Great Britain. Construing the treaty of 1842, the Court declared:

We have already seen that, according to the doctrine of publicists and writers on international law, the country receiving the offender against its laws from another country had no right to proceed against him for any other offence than that for which he had been delivered up. This is a principle which commends itself as an appropriate adjunct to the discretionary exercise of the power of rendition, because it can hardly be supposed that a government which was under no treaty obligation nor any absolute obligation of public duty to seize a person who had found an asylum within its bosom and turn him over to another country for trial, would be willing to do this, unless a case was made of some specific offence of a character which justified the government in depriving the party of his asylum. It is unreasonable that the country of the asylum should be expected to deliver up such person to be dealt with by the demanding government without any limitation, implied or otherwise, upon its prosecution of the party . . . Indeed, the enumeration of offences in most of these [extradition] treaties, and especially in the treaty now under consideration, is so specific, and marked by such a clear line in regard to the magnitude and importance of those offences, that it is impossible to give any other interpretation to it than that of the exclusion of the right of extradition for any others . . . Nor can it be said that, in the exercise of such a delicate power under a treaty so well guarded in every particular, its provisions are obligatory alone on the State which makes the surrender of the fugitive, and that that fugitive passes into the hands of the country which charges him with the offence, free from all the positive requirements and just implications of the treaty under which the transfer of his person takes place. A moment before he is under the protection of a government which has afforded him an asylum from which he can only be taken under a very limited form of procedure, and a moment after he is found in the possession of another sovereignty by virtue of that proceeding, but divested of all the rights which he had the moment before, and all the rights which the law governing that proceeding was intended to secure.¹

In *Charlton v. Kelly*,² it was said that the use of the term "persons" in a treaty of extradition included citizens of the United States who were

¹ 119 U. S. 407, 419-421 (1886).

² 229 U. S. 447. See § 97.

claimed to have committed crimes in Italy, even though Italy would not grant extradition under the treaty of Italian nationals claimed by the United States to have committed crimes within the jurisdiction of the United States. But while this appears to be the practice of the United States where the term "persons" appears in the treaty, a provision that "neither of the contracting parties shall be bound to deliver up its own citizens or subjects," has been construed as reversing this practice, and as preventing the granting of extradition of American citizens even in cases where the Executive desires to grant it.³ The principal reason advanced for this construction is that the Act of Congress (R. S. § 5270) provides for surrender only according to the stipulations of a convention. The Executive has only such power to surrender as may be found in the convention, and a stipulation that neither party is bound to deliver up its citizens is not the affirmative grant of power required. The Court was evidently influenced by a number of treaties explicitly providing for executive discretion. For example, a treaty of 1899 between the United States and Mexico⁴ provided that "neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, but the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so." Commenting on the decision of the Circuit Court of Appeals which this judgment affirmed, J. W. Garner declared his belief that this judgment will "be generally regretted," since its result is that the United States, without intending to do so, "has deprived the President of all power to surrender American criminals for trial and punishment in the countries whose laws they have violated."⁵

Two contrasting quotations will serve to illustrate the problem created by the refusal of a large number of States to surrender their own nationals when they have committed offenses abroad. J. L. Brierly says:

The majority of States decline to extradite their own nationals. Great Britain and the United States, regarding criminal jurisdiction as essentially territorial, are prepared in principle to do so; actually, the treaties of these two States contain varying provisions on this point, doubtless on account of the difficulty of securing reciprocity for their policy. It is, however, not easy to justify in principle the policy of refusing to extradite nationals. The theory that a State should try its own nationals for crimes wherever committed fails as a justification for two reasons: (a) Because in many cases it is impracticable to try a crime committed in another country on account of the impossibility of securing the relevant evidence; and (b) because the argument cannot have any application to a national who has escaped to his own country *after conviction* in a foreign country, since

³ *Valentine v. Neidecker* (1936), 299 U. S. 5.

⁴ Malloy, *Treaties*, I, 1186.

⁵ 30 *A.J.I.L.* (1936), 480, 486.

on general principles of justice such a person may not be tried again for the same offense. If, on the other hand, the refusal to surrender a national arises from a lack of confidence that justice will be rendered to him in the foreign State, that would seem to be a reason which would justify the refusal of extradition to that State altogether, but could not justify the practice of differentiating between nationals and other persons. But whatever the respective merits of these different views as to the extraditability of nationals may be, and even if the States should be unwilling to adopt a uniform practice on the point, we do not think that this question of itself creates any insuperable bar to a general convention on extradition. . . .⁶

With regard to this, M. de Visscher observes:

Like the Rapporteur, I am, in principle, of opinion that the authorities of the country where an offense has been committed are the authorities best qualified to punish it, and that, in this respect, they possess a natural jurisdiction which it would be desirable to see recognized as widely as possible. Nevertheless, in practice, one has to take account, not merely of the strong repugnance which the great majority of States display against handing over their nationals to a foreign country, but also of the reasons which explain this feeling and which, as a matter of fact, vary considerably from country to country. For example, there is no doubt that a country's attitude in this matter will always be influenced by the amount of confidence which it feels in the administration of justice in a particular other country and—despite all theoretical considerations—one cannot be surprised that a country should be more exacting in its appreciation when it is called on to hand over one of its own nationals than when the subject of extradition is a foreigner. It might be useful, as Mr. Brierly suggests, to provide for the insertion of a general clause declaring that the extradition of nationals was allowable unless the contrary was provided. There are already various treaties containing clauses to this effect; this is the case, for example, with general extradition treaties concluded by France.⁷

§ 107. THE RULE OF DOUBLE CRIMINALITY

Factor v. Laubenhimer

SUPREME COURT OF THE UNITED STATES, 1933

290 U. S. 276.

MR. JUSTICE STONE delivered the opinion of the Court.

On complaint of the British Consul, a United States Commissioner for the Northern District of Illinois issued his warrant to hold petitioner in custody for extradition to England, under Article X of the Webster-

⁶ "Report to the Committee of Experts for the Progressive Codification of International Law," 20 *A.J.I.L.* (Supp., 1926), 244-245.

⁷ Observations on Brierly's Report, *ibid.*, 249.

Ashburton Treaty of 1842 (1 Malloy's Treaties, pp. 650, 655) as supplemented by the Blaine-Pauncefote Convention of 1889 (1 Malloy's Treaties, 740) and certified the evidence in the proceeding before him to the Secretary of State under the provisions of section 651, Tit. 18, U.S.C.A. The application for extradition was based on a charge that petitioner, at London, had "received from Broadstreet Press Limited" certain sums of money, "knowing the same to have been fraudulently obtained." Upon application by the petitioner for writ of *habeas corpus*, and certiorari in its aid, the District Court for Northern Illinois ordered him released from custody on the ground that the act charged was not embraced within the applicable treaties because not an offense under the laws of Illinois, the state in which he was apprehended and held. On appeal the Court of Appeals for the Seventh Circuit reversed the judgment of the District Court, 61 F. (2d) 626, on the ground that the offense was a crime in Illinois, as had been declared in *Kelly v. Griffin*, 241 U. S. 6. This Court granted certiorari, 289 U. S. 713, on a petition which presented as ground for the reversal of the judgment below that, under the Treaty of 1842 and Convention of 1889, extradition may not be had unless the offense charged is a crime under the law of the state where the fugitive is found and that "receiving money, knowing the same to have been fraudulently obtained," the crime with which the petitioner was charged, is not an offense under the laws of Illinois.

In support of this contention, petitioner asserts that it is a general principle of international law that an offense for which extradition may be had must be a crime both in the demanding country and in the place where the fugitive is found, and that the applicable treaty provisions, interpreted in the light of that principle, exclude any right of either country to demand the extradition of a fugitive unless the offense with which he is charged is a crime in the particular place of asylum. See *Wright v. Henkel*, 190 U. S. 40, 61. But the principles of international law recognize no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled, and it has been said that it is under a moral duty to do so (see 1 Moore, Extradition, § 14; Clarke, Extradition, 4th ed., p. 14) the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty. See *United States v. Rauscher*, 119 U. S. 407, 411, 412; *Holmes v. Jennison*, 14 Pet. 540, 569, 582; *United States v. Davis*, 2 Sumn. 482; *Case of Jose Ferreira dos Santos*, 2 Brock. 493; *Commonwealth ex rel. Short v. Deacon*, 10 S. & R. 125; 1 Moore, Extradition, §§ 9-13; cf. *Matter of Washburn*, 4 Johns. Ch. 105, 107; 1 Kent. Com. 37. To determine the nature and extent of the right we must look to the treaty which created it. The question presented here, therefore, is one of

the construction of the provisions of the applicable treaties in accordance with the principles governing the interpretation of international agreements.

The extradition provisions of the treaty with Great Britain of 1842 are embodied in Article X, which provides that each country, "shall . . . deliver up to Justice all persons who, being charged with" any of seven named crimes "committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other." The crime charged here is not one of those specified in Article X and is therefore not an offense with respect to which extradition may be demanded, unless made so by the provisions of the supplemental convention of 1889. That convention recites that it is desired by the high contracting parties that the provisions of Article X of the earlier treaty should "embrace certain crimes not therein specified," and agrees by Article I that ¹ the provisions of Article X of the earlier treaty shall be made applicable to an added schedule of crimes specified in ten numbered classes of offenses and one unnumbered class. In the case of certain offenses, those enumerated in the classes numbered 4 and 10, and in the unnumbered class, Article X applies only if they are, in the former case, "made criminal" and, in the latter, "punishable," "by the

¹ The applicable provisions of the Convention of 1889 are as follows:

"Whereas by the Tenth Article of the Treaty concluded between the United States of America and Her Britannic Majesty on the ninth day of August, 1842, provision is made for the extradition of persons charged with certain crimes;

"And Whereas it is now desired by the High Contracting Parties that the provisions of the said Article should embrace certain crimes not therein specified, and should extend to fugitives convicted of the crimes specified in the said Article and in this Convention;

"The said High Contracting Parties have appointed as their Plenipotentiaries to conclude a Convention for this purpose . . .

"Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon and concluded the following Articles:

ARTICLE I.

"The provisions of the said Tenth Article are hereby made applicable to the following additional crimes:

"1. Manslaughter, when voluntary.

"2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.

"3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.

"4. Fraud by bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries:

"5. Perjury, or subornation of perjury.

"6. Rape; abduction; child-stealing; kidnapping.

"7. Burglary; house-breaking or shop-breaking.

"8. Piracy by the law of nations.

"9. Revolt, or conspiracy to revolt by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

"10. Crimes and offences against the laws of both countries for the suppression of slavery and slave-trading.

"Extradition is also to take place for participation in any of the crimes mentioned in this Convention or in the aforesaid Tenth Article, provided such participation be punishable by the laws of both countries."

laws of both countries." No such limitation is expressed with respect to the crimes enumerated in the other eight classes, one of which, the third, includes the crime with which petitioner is charged. Thus, like Article X of the earlier treaty, Article I specifies by name those offenses upon accusation of which the fugitive is to be surrendered and it extends to them the obligation of the earlier treaty. But Article I, unlike Article X, singles out for exceptional treatment certain of the offenses named, which in terms are brought within the obligation of the treaty only if they are made criminal by the laws of both countries.

Notwithstanding this distinction, appearing on the face of the convention, petitioner insists that in no case does it require extradition of a fugitive who has sought asylum in the United States unless the criminal act with which he is charged abroad is similarly defined as a crime by the laws of the particular state, district or territory of the United States in which he is found. The only language in the two treaties said to support this contention is the proviso in Article X of the Treaty of 1842, following the engagement to surrender fugitives charged with specified offenses, which reads as follows: "Provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed . . ."

It cannot be said that these words give any clear indication that a fugitive charged with acts constituting a crime named in the treaty is not to be subject to extradition unless those acts are also defined as criminal by the laws of the state in which he is apprehended. The proviso would appear more naturally to refer to the procedure to be followed in the country of the asylum in asserting and making effective the obligation of the treaty and particularly to the quantum of proof—the "evidence"—which is to be required at the place of asylum to establish the fact that the fugitive has committed the treaty offense within the jurisdiction of the demanding country.

When the treaty was adopted there was no statutory provision of the United States regulating the procedure to be followed in securing extradition of the fugitive, and the necessary procedure was provided in the treaty itself. By the proviso, the observance of the laws of the place of refuge is exacted in apprehending and detaining the fugitive. See *Benson v. McMahon*, 127 U. S. 457; *In re Metzger*, 17 Fed. Cas. 232. It prescribes a method of procedure, in conformity with local law, by which compliance with the obligation of the treaty may be exacted at the place of refuge; and sets up a standard by which to measure the amount of the proof of the offense charged which the treaty requires as prerequisite to extradition.

The standard thus adopted is that which under local law would determine the sufficiency of the evidence to justify the apprehension and commitment "if the crime or offence had there been committed."

Were Article X intended to have the added meaning insisted upon by petitioner, that there should be no extradition unless the act charged is one made criminal by the laws of the place of refuge, that meaning would naturally have been expressed in connection with the enumeration of the treaty offenses, rather than in the proviso which, in its whole scope, deals with procedure. That no such meaning can fairly be attributed to the proviso becomes evident when Article X is read, as for present purposes it must be, with the supplementary provisions of the Convention of 1889.

The draftsmen of the latter document obviously treated the proviso as dealing with procedure alone, since they took care to provide in Article I that fugitives should be subject to extradition for certain offenses, only if they were defined as criminal by the laws of both countries but omitted any such provision with respect to all the others enumerated, including the crime of "receiving," with which petitioner is charged. This was an unnecessary precaution and one not consistently taken if the proviso already precluded extradition when the offense charged is not also criminal in the particular place of asylum. A less strained and entirely consistent construction is that urged by respondent, that the specification of the crime of "receiving," as a treaty offense, without qualification, evidenced an intention to dispense with the restriction applied to other treaty offenses, that they must be crimes "by the laws of both countries."

In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred. *Jordan v. Tashiro*, 278 U. S. 123, 127; *Geofroy v. Riggs*, 133 U. S. 258, 271; *In re Ross*, 140 U. S. 453, 475; *Tucker v. Alexandroff*, 183 U. S. 424, 437; *Asakura v. Seattle*, 265 U. S. 332. Unless these principles, consistently recognized and applied by this Court, are now to be discarded, their application here leads inescapably to the conclusion that the treaties, presently involved, on their face require the extradition of the petitioner, even though the act with which he is charged would not be a crime if committed in Illinois.

In ascertaining the meaning of a treaty we may look beyond its written

words to the negotiations and diplomatic correspondence of the contracting parties relating to the subject-matter, and to their own practical construction of it. *Nielsen v. Johnson*, 279 U. S. 47, 52; *In re Ross*, *supra*, 467; *United States v. Texas*, 162 U. S. 1, 23; *Kinkead v. United States*, 150 U. S. 483, 486; *Terrace v. Thompson*, 263 U. S. 197, 223. And in resolving doubts the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight, *Nielsen v. Johnson*, *supra*, 52; *Charlton v. Kelly*, 229 U. S. 447, 468. But the exhaustive search, by counsel, through available diplomatic records and correspondence, in response to the invitation of the Court in its order for reargument of this cause, has disclosed nothing in diplomatic history which would afford a basis for any different conclusion.

Within two years of the proclamation of the Treaty of 1842, our State Department had occasion to construe the provisions of Article X, now under consideration, and to take a definite position as to their scope and meaning. Certain fugitive slaves, charged with robbery and murder by indictment of the grand jury for the District of Florida, had fled to Napan in the Bahama Islands. Requisition was made in due course for their extradition, and the Governor of the Bahamas, in conformity to the local procedure, issued his requisition for the fugitives to the Chief Justice of the Colony. The court over which he presided refused to order the extradition of the fugitives and directed their discharge on the grounds that the indictment was not of itself sufficient evidence of the offense charged, apparently committed by the slaves in effecting their escape, although criminal in Florida, did not appear to be so under British Law.

From the ensuing diplomatic correspondence it clearly appears that this government then asserted that the Treaty of 1842 obligated both parties to surrender fugitives duly charged with any of the offenses specified in Article X without regard to the criminal quality of the fugitive's acts under the law of the place of asylum. This contention was supported by full and cogent argument in the course of which it was specifically pointed out that the proviso of Article X relates to the procedure to be followed in asserting rights under the treaty and is not a limitation upon the definition of the offenses with respect to which extradition might be demanded.

The political department of the government, before the negotiation of the Convention of 1889, had thus clearly and emphatically taken the position that the correct construction of Article X is that for which respondent contends here, a construction which, as already indicated, is supported and confirmed by the provisions of the Convention of 1889. Our government does not appear to have receded from that position, and while the British government has never definitely yielded to it, except in so far as the arguments addressed to us in behalf of the respondent may be taken to have

that effect, that fact, or even the failure of Great Britain to comply with the obligations of the treaty, would not be ground for refusal by this government to honor them or by this Court to apply them. Until a treaty has been denounced, it is the duty of both the government and the courts to sanction the performance of the obligations reciprocal to the rights which the treaty declares and the government asserts, even though the other party to it holds to a different view of its meaning. *Charlton v. Kelly*, *supra*, 472, 473. The diplomatic history of the treaty provisions thus lends support to the construction which we think should be placed upon them when read without extraneous aid, but with that liberality demanded generally in the interpretation of international obligations.

Other considerations peculiarly applicable to treaties for extradition, and to these treaties in particular, fortify this conclusion. The surrender of a fugitive, duly charged in the country from which he has fled with a non-political offense and one generally recognized as criminal at the place of asylum, involves no impairment of any legitimate public or private interest. The obligation to do what some nations have done voluntarily, in the interest of justice and friendly international relationships, see 1 Moore, *Extradition*, § 40, should be construed more liberally than a criminal statute or the technical requirements of criminal procedure. *Grin v. Shine*, 187 U. S. 181, 184; *Yordi v. Nolte*, 215 U. S. 227, 230. All of the offenses named in the two treaties are not only denominated crimes by the treaties themselves, but they are recognized as such by the jurisprudence of both countries. Even that with which petitioner is charged is a crime under the law of many states, if not in Illinois, punishable either as the crime of receiving money obtained fraudulently or by false pretenses, or as larceny. See *United States v. Mulligan*, 50 F. (2d) 687. Compare *Kelly v. Griffin*, *supra*, p. 15. It has been the policy of our own government, as of others, in entering into extradition treaties, to name as treaty offenses only those generally recognized as criminal by the laws in force within its own territory. But that policy, when carried into effect by treaty designation of offenses with respect to which extradition is to be granted, affords no adequate basis for declining to construe the treaty in accordance with its language, or for saying that its obligation, in the absence of some express requirement, is conditioned on the criminality of the offense charged according to the laws of the particular place of asylum. Once the contracting parties are satisfied that an identified offense is generally recognized as criminal in both countries there is no occasion for stipulating that extradition shall fail merely because the fugitive may succeed in finding, in the country of refuge, some state, territory or district in which the offense charged is not punishable. No reason is suggested or apparent why the solemn and unconditional engagement to surrender a fugitive charged with the named

offense of which petitioner is accused should admit of any inquiry as to the criminal quality of the act charged at the place of asylum beyond that necessary to make certain that the offense charged is one named in the treaty. See *Collins v. Loisel*, 259 U. S. 309, 317; *Grin v. Shine*, *supra*, 188.

It is of some significance also that the construction which petitioner urges would restrict the reciprocal operation of the treaty. Under that construction the right to extradition from the United States may vary with the state or territory where the fugitive is found although extradition may be had from Great Britain with respect to all the offenses named in the treaty. While under the laws of Great Britain extradition treaties are not self-executing, and effect must be given to them by an act of Parliament designating the crimes, upon charge of which extradition from Great Britain and its dependencies may be had, all the offenses named in the two treaties have been so designated by Acts of Parliament of 1870, 33 and 34 Victoria, c. 52, as amended by Act of 1873, 36 and 37 Victoria, c. 60.

The District Court for Southern New York decided, in 1847, that the proviso in the Extradition Treaty with France of November 9, 1843, like that in Article X, did not require that the treaty offense charged to have been committed in France should also be a crime in New York, the place of asylum. In *re Metzger*, *supra*. The precise question now before us seems not to have been decided in any other case and in no case in this Court has extradition been denied because the offense charged was not also criminal by the laws of the place of refuge. In *Wright v. Henkel*, *supra*, the offense charged, fraud by a director of a company, was, by paragraph 4 of Article I of the Convention of 1889, a treaty offense only if made criminal by the laws of both countries. In *Collins v. Loisel*, *supra*, and in *Kelly v. Griffin*, *supra*, the question was whether the crime charged was a treaty offense. The court so held and the right to extradition was sustained. The offense charged was said to be a crime in both countries, and it seems to have been assumed without discussion, and not questioned, that its criminality at the place of asylum was necessary to extradition. See also, *Bingham v. Bradley*, 241 U. S. 511, 518. That assumption is shown here to have been unfounded.

The petitioner also objects that the Dawes-Simon Extradition Treaty with Great Britain of 1932, 47 Stat. 2122, is now in force;² that it does not name as a treaty offense the receiving of money, knowing it to have been fraudulently obtained, the crime with which petitioner is charged, and, that by abrogating the earlier extradition treaties between the two countries it has abated this proceeding and that for the extradition of the petitioner which was brought while the Treaty of 1842 and the Convention of 1889 were in force.

² See § 102 above.—Ed.

The ratifications of the Dawes-Simon Treaty were announced by presidential proclamation of August 9, 1932, which declared that the treaty was made public to the end that "every article and clause thereof may be observed and fulfilled with good faith" by the United States and its citizens. Article 18 provides that: "The present treaty shall come into force in ten days after its publication in conformity with the forms prescribed by the high contracting parties." Under the applicable provisions of the British Extradition Act of 1870, 33 and 34 Victoria, c. 52, as amended by the Act of 1873, 36 and 37 Victoria, c. 60, extradition treaties are carried into effect and given the force of law in Great Britain by publication of an Order-in-Council embodying the terms of the treaty, and directing that the Extradition Act shall apply with respect to the foreign state which has entered into the treaty. As appears from the record, and as is conceded, no Order-in-Council has been promulgated with respect to this treaty, and the State Department appears not to have recognized it as in force in either country. See *Doe v. Braden*, 16 How. 635, 656.

We find it unnecessary to determine whether or not the treaty, as suggested on the argument, is now in force, and binding on the United States, although not binding on Great Britain until proclaimed by an Order-in-Council. For if we were to arrive at that conclusion, we could not say that its obligation would not extend to the offense with which petitioner is charged, or that its substitution for the earlier treaties would abate the proceeding for the extradition of petitioner or the pending *habeas corpus* proceeding.

Paragraph 18 of article 3 of the Dawes-Simon Treaty includes among the offenses for which extradition may be demanded "receiving any money, valuable security or other property, knowing the same to have been stolen or unlawfully obtained." It is insisted that "receiving money," knowing the same to have been stolen or unlawfully obtained, is not the equivalent of receiving money, knowing the same to have been fraudulently obtained. It is not denied that the phrase "unlawfully obtained," standing alone, is as broad as the phrase "fraudulently obtained." But it is asserted that its use in association with the word "stolen" restricts its meaning to offenses of the same type of unlawfulness as stealing, which it is said involves only those forms of criminal taking which are without the consent or against the will of the owner or the possessor. But we think the words of the treaty present no opportunity for so narrow and strict an application of the rule of *ejusdem generis*. The rule is at most one of construction, to be resorted to as an aid only when words or phrases are of doubtful meaning. Extradition treaties are to be liberally, not strictly, construed. The words "steal" and "stolen" have no certain technical significance making them applicable only with respect to common law larceny. They are not

uncommonly used as implying also a taking or receiving of property by embezzlement or false pretenses, offenses which are often embraced in modern forms of statutory larceny. Whatever was left vague or uncertain by the use of the word "stolen" was made certain by the added phrase "or unlawfully obtained," as indicating any form of criminal taking whether or not embraced within the term larceny in its various connotations. Even if the word "stolen" were to be given the restricted meaning for which the petitioner contends, it would be so precise and comprehensive as to exhaust the genus and leave nothing essentially similar on which the general phrase "or unlawfully obtained" could operate. This phrase, like all the other words of the treaty, is to be given a meaning, if reasonably possible, and rules of construction may not be resorted to to render it meaningless or inoperative. See *Mason v. United States*, 260 U. S. 545, 553.

As the crime with which petitioner is charged is an extraditable offense under the Dawes-Simon Treaty, the effective promulgation of that treaty and the consequent abrogation of earlier ones would not abate the pending proceedings. The obligation of the later treaty, by its terms, extends generally to fugitives charged with the several offenses named, without regard to the date of their commission. See *In re Giacomo*, 12 Blatch. 391; 1 Moore on Extradition, § 86. It does not purport to exclude from its operation crimes committed before signature or promulgation, as did Article VIII of the Treaty of 1889. Hence, it did not by mere force of the abrogation of the earlier treaty relinquish the obligation under it to surrender the petitioner, but continued it by making the offense with which he was charged extraditable even though it antedated the treaty.

The extradition proceeding has not come to an end. The petitioner's commitment by order of the commissioner was "to abide the order of the Secretary of State," and continues in force so long as the Secretary may lawfully order his extradition. Hence, the new treaty, if in force, is authority for the Secretary to issue his extradition warrant under section 653 of U.S.C.A., Title 18. The detention of the petitioner being lawful under treaty provisions continuously in force since his arrest, the proceeding in *habeas corpus* is not moot and does not abate merely because the obligation to surrender the petitioner for trial upon the offense charged, and for which he is held, originating in one treaty, was continued without change of substance in the other. See *Abie State Bank v. Bryan*, 282 U. S. 765, 781.

Affirmed.

Mr. Justice BUTLER, dissenting.

I. The decision just announced holds that the United States is bound by treaty to surrender its citizens and others to England there to be prosecuted criminally and punished for that which if committed here would transgress no law—federal or state. . . .

I am of opinion:

The acts of receiving of which petitioner is accused in England are not made criminal in Illinois where he was found. That is now practically conceded by England. The court impliedly so holds and necessarily—even if *sub silentio*—overrules its decision on that point in *Kelly v. Griffin*, 241 U. S. 6, 15.

The contracting parties, upon adequate grounds and in accordance with uniform usage, have always adhered to the principle that extradition will not be granted for acts that are not deemed criminal in the place of asylum.

There is nothing in the treaties to support the majority opinion that, while England is not similarly bound, the United States agreed to deliver up fugitives for acts not criminal in the place of asylum.

The proviso in Article X prescribes the evidence that the demanding country is required to produce. It impliedly indicates that neither party agreed to extradite for acts not criminal under its laws.

The letters of Secretary Calhoun pointed to by our order for reargument do not support the majority opinion. They have no bearing upon the question presented.

The judgment of the Circuit Court of Appeals should be reversed.

I am authorized to say that Mr. Justice BRANDEIS and Mr. Justice ROBERTS join in this dissent.³

§ 108. THE RULE OF DOUBLE CRIMINALITY (*Continued*)

Decision on the Application of the United States of America for the Extradition of Samuel Insull, Sr.

GREEK COURT OF APPEALS DECISION NO. 119/1933, ATHENS, OCTOBER 31, 1933

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The Council of the Court of Appeals at Athens, composed of the Justices Emm. Panegyrikis, President, John Antoniadis, George Tsirigotis, Chr. Stavropoulos and Alex. Digenopoulos, and the Clerk D. G. Chronaios, upon the report of the Justice Alex. Digenopoulos, rendered the following decision:

I. WHEREAS, according to the more correct and generally accepted view, extradition does not aim exclusively at rectifying the affront done by the accused to the law of the country demanding his extradition, and can not be granted unless the act for which the accused has been indicted or sen-

³ See Manley O. Hudson, "The Factor Case and Double Criminality in Extradition," 28 *A.J.I.L.* (April, 1934), 274.—Ed.

tenced is punishable under the law of both countries, *i.e.*, the extraditing country and the country demanding the extradition (see French *Pandects*, *s.v.*, "Extradition," Vol. 31, Nos. 226-231. *Contra*, Bernard, Vol. 2, p. 209). It is, of course, evident that the offense need not bear the same name nor be included in the same category nor be punished by the same penalty in the two sets of laws. It has finally become accepted as a general deduction, that the mere investigation as to whether the offense with which the accused is charged is included in those for which extradition is permitted under the treaty, is not sufficient or in itself satisfies the extraditing country's conception of justice, since that country is under obligation to give the accused person the same lawful protection as to its own citizens, in accordance with the unwritten law of protection of the liberty of those who have taken refuge on its soil. And the most modern conceptions on this subject go still further and give the extraditing country the right to examine the substance and basis of the charges against the accused, in order that thereby additional safeguards may be created for personal liberty, without thereby wounding the susceptibilities of the country demanding the extradition, nor creating any doubt or distrust as to the dispensation of justice in the extraditing country, which on general principles is satisfied to have the offender removed out of its territory. It is self-evident that insuperable difficulties would be encountered and often a faulty judgment would be rendered by a judge, if he were forced to judge the facts without investigating them according to the law with which he is familiar and to his conception of the right of personal liberty. These correct principles are embodied in the provisions of Article 3 of Law ΔΛΑ' (1912), which, under Article 2 of Law 5554, apply to the Extradition Treaty between Greece and the United States. The latter country has applied for the extradition of the arrested person as having violated within its territory the bankruptcy laws, an offense for which extradition is permitted according to Article 2, Section 25, of the said treaty. And from Article 5 of the treaty, which forbids extradition in case by reason of prescription (under the law of limitations) or for any other lawful reason under the laws of either country, the fugitive from justice escapes the prosecution and the punishment of his offense, the acceptance of the foregoing conclusions is to be deduced.

These conclusions are furthermore clearly recognized by the wording of Article 1 of the treaty, which expressly provides that extradition can not be granted unless and in so far as, according to the laws of the extraditing country, there is sufficient evidence (plainly meaning *indications*) of guilt, justifying the arrest and commitment for trial of the accused if the offense had been committed in the extraditing country itself. Hence, it is clear that, if there has been no offense according to the laws of the extraditing coun-

try, extradition is not granted, since in such case the judge hearing the application is usually able to judge correctly of the matter and is called upon without any serious necessity to sacrifice his convictions concerning liberty of the person, derived from the conceptions of law prevailing in his country, without which it becomes impossible to serve the ends of justice, which was the objective of the parties to the treaty. And therefore, to remove any doubts on this point, this principle is expressly stated in connection with Article 2, Sections 22 and 23, of the treaty, treating of special offenses for which extradition is permitted, provided the offense is punishable under the laws of both states. Therefore, this court, being plainly incompetent to examine also the constitutionality of the laws which are quoted in the indictment, as interpreted by the competent authorities of the country demanding the extradition and on which laws the indictment is based, can only examine whether the acts charged in the indictment constitute a violation of the Greek laws on bankruptcy; and the court will then proceed to the estimation of whether the charges are well-founded and whether the evidence furnishes sufficient probabilities to justify the accused's commitment for trial, which is all that Greek law requires for commitment.

II. WHEREAS, according to the documents produced, the indictment charged the accused with five offenses, all committed by him and others as officers and agents of a corporation that has since gone into bankruptcy, at a time when the said corporation was insolvent, and in contemplation of the possibility of the corporation's bankruptcy, which acts were performed unlawfully, deliberately, and deceitfully, with the intention of frustrating the object of the bankruptcy law of the United States. Of these counts, the second and third, as specified in the indictment, consist in the transfer (delivery) to existing creditors of certain assets (securities) of the bankrupt corporation, for the sole purpose that these assets should serve as additional security for loans already lawfully contracted at a time when there was no doubt (*as to the corporation's solvency*). The fourth count consists in the immediate *partial* payment of \$1,000,000 to an existing creditor of the bankrupt corporation, against a debt of \$5,000,000 existing at the time of the said payment, although the corporation's total liabilities (according to the indictment) amounted at that time to \$59,237,313.80 as against assets amounting to \$35,264,445.03. The fifth act, in due consideration of the circumstances set forth in the indictment, also took place at a time when the company's liabilities were in a similar state as described above, and is nothing else than a giving of security in cash, intended as a preferential satisfaction, in the event of bankruptcy, of a real creditor, who had at that time a larger claim, as being a creditor for a sum of \$4,000,000 and who received a security of \$291,000. Lastly, under the first count, the accused being, together with others, an officer (Chairman of the Board of Directors and

member of the Executive Committee) of the bankrupt corporation and well knowing the latter's insolvent condition, etc., handed over out of the corporation's assets and capital a sum of \$558,120 to The Northern Trust Company of Chicago, which, acting on the accused's instructions, used this sum for the payment of a dividend to the holders of the company's preferred stock (amongst whom was the accused himself), which dividend was paid, not out of real earnings or surpluses of the company, but really out of its capital, the earnings and surpluses being fictitious and imaginary.

All the foregoing five counts constitute offenses (according to the indictment) against the laws of the United States, and are punishable by imprisonment not exceeding five years, if committed by officers or agents of a person or corporation who, in contemplation of the corporation's bankruptcy or with intent to frustrate the operation of the bankruptcy law, shall conceal or transfer any assets of the corporation or person, whose officers or agents they are, "transfer" being understood, under the official interpretation, to mean any alienation of the property or of its possession, whether absolute or conditional, and if attempted in any manner.

These acts constitute offenses under the Greek bankruptcy laws, as well. Our law specially and restrictively provides for the responsibility of the administrators of a bankrupt company, even to a greater extent than the American law, by Articles 680 (592) and 685 (597) of the Commercial Law. Article 680, Section 2, punishes for simple bankruptcy (in case of the company's bankruptcy) the administrators of the company, if the latter's bankruptcy was brought about through any fault of theirs. For every act or omission on their part, within the circle of the duties laid upon them by the company's statutes, or through any deliberate overstepping of the limits of their authority, which is not in mere execution of decisions lawfully taken under the statutes, or which was even due to indecision or indolence on their part, the said officers or agents are held liable, if it is proved that but for such acts or omissions the company would not have become bankrupt (see Antonopoulos, Section 26). The estimation of the kind and degree of the responsibility of administrators the law leaves entirely to the judgment of the judge (Costis, Vol. 3, Section 51). Article 685 of the Commercial Law provides also for other offenses irrelevant to the present case and punishes for fraudulent bankruptcy (*i.e.*, as a crime in the case of the bankruptcy of a company) the administrators of the company who pay to the shareholders dividends manifestly nonexistent and thereby reduce the share capital. It also punishes those who by fraud or through fraudulent acts cause the company's bankruptcy. The danger from the payment to the shareholders of nonexistent dividends by reducing the share capital is manifest; and such acts are manifestly intended as a snare for the attraction of outside capital to a precarious enterprise, whose only

object is the administration of such capital to the profit of the administrators, who thus prolong their benefits (Antonopoulos, Section 52). This payment of dividends manifestly nonexistent at the expense of the share capital is in itself fraudulent and it is unnecessary to prove any other more specific definition of fraud. This provision, which defines the administrator's responsibility for such an act only in case of subsequent bankruptcy of the company, and irrespectively of whether at the time of payment of the dividends the company was insolvent and of whether this payment, though manifestly fraudulent, gave rise to the company's bankruptcy or not, has not ceased to be in force even after the enactment of Law 2190. The latter law in Article 34d, merely ordains that the General Meeting of Shareholders is competent to decide as to the approval of the balance sheet and the disposal of the annual profits; and by Article 57c, it punishes (irrespectively of whether bankruptcy ensued or not) any person who fraudulently, without a balance sheet or contrary to the balance sheet or under a false or unlawful balance sheet, attempts the distribution of profits or interest to shareholders not derived from real earnings. This law, in order to prevent irregularities (which experience has shown to be direful in their results), filled in a gap in our legislation by ordaining the criminal responsibility of an administrator even in case the company's bankruptcy did not ensue from his said act, without excluding his responsibility for the crime based upon other real facts and not covered by the decisions of the General Meeting, whereby in the case of a crime the administrator's fraudulent intent is established of itself or by the circumstances (see Antonopoulos, Section 52).

As to the second case provided for in Section 5 of Article 685, it must be examined only whether, in the opinion of the judge, fraudulent acts have been committed and whether these caused the bankruptcy; it is immaterial whether the bankruptcy which resulted was included in the administrator's fraudulent intention (Antonopoulos, Section 52).

According to the court's due estimation of the charges contained in the indictment, all these charges come under the provisions of Article 685, Section 5, of the Commercial Law. The first count, *i.e.*, the payment of dividends to a certain class of shareholders with full knowledge of the company's insolvency (which is held, by the official interpretation produced, to exist when the total assets, at a just valuation, do not cover the company's liabilities) and done, as expressed in the indictment, *in contemplation of bankruptcy*, according to the facts concisely but clearly set forth, thereby giving rise to the subsequent bankruptcy of the company (whether this was included in the fraudulent intent of the company's administrators or not), comes entirely under the provisions of the said Article 685, Section 5. A separate charge as to violation of Section 3 of that article does not seem

to be contained in the indictment. Nevertheless, it is expressly stated, in the first count, that the said payment of dividends was made fraudulently by the accused, as administrator of the company, with full knowledge of the company's insolvency and in contemplation of its bankruptcy, which actually took place. And for greater specification of the fraud committed in this act, the indictment states that the accused was well aware of the nonexistence of any profits or surpluses and that he derived in his capacity as shareholder a personal benefit from the payment of said dividend.

III. WHEREAS, after what has been said above on the strength of the evidence produced in the records (*dossier*) and the evidence produced by the defense, all duly considered and developed orally during the hearing, the court now proceeds to the examination of how far the charges against the accused are founded in fact. It has been established that the accused, now of advanced age and suffering from a serious complaint, was primarily an engineer of great enterprise, an assistant of the great inventor Edison; that he contributed in a marked and characteristic manner to the world's industrial progress, by achieving the production of cheaper electricity, whereby electricity was introduced into a variety of domestic and industrial uses. That having built up an electric empire of three billion dollars and created enterprises that were in many ways useful to mankind, he acquired such prestige in America that everybody believed that any enterprise that bore his name must be profitable, and the public hastened to buy his shares for the sole reason that they bore his name. Thus by the year 1929 he controlled a group of 52 companies, most of which are still in existence and in flourishing operation. Under the glamour of this prestige, on October 5, 1929, there was founded under his presidency (for which he received no salary) the "Corporation Securities Company of Chicago," which subsequently went into bankruptcy and out of whose activities the present prosecution has arisen. This company, according to the statutes and to the testimony of Harold Huling (p. 241), was founded to do business in general securities, buying and selling securities or holding such for sale. This object was one fraught with many dangers. A similar company, the "Insull Utilities Investments, Inc.," had already been formed on December 27, 1928, under the presidency of the accused, with exactly the same object. The capital of the Corporation Securities Company of Chicago amounted to about \$144,000,000, raised chiefly from the public. According to H. Huling's testimony (p. 238), the accused and his relatives participated in the said Corporation Securities Company to the extent of 7,045,436 common and 45,436 preferred shares. The company's entire capital was invested in shares of the other Insull companies (and especially in Insull Utilities Investments), and finally evaporated, so that on the day of the company's suspension of payments (April 16, 1932), the day before the petition of

bankruptcy was filed, the company's position was truly a picture of ruin. On that day the company had no assets or property whatever. According to the testimony (p. 256) of Mr. H. Huling, who carried out a general audit of the books not only of this company but also of the other companies with which it was in close relations, the Corporation Securities Company's assets on that day comprised a small amount in cash and insignificant accounts for collection, and 98 per cent of its assets consisted of company securities, while its liabilities on the same day (see p. 259 of Huling's testimony) exceeded its assets by \$45,140,133.31. This was, in truth, one of the biggest failures in history, as the American press described it, and the public's unbounded confidence in the accused created irreparable disasters and many victims. It should not be overlooked that, in justice to the public, the statutes of the Corporation Securities Company of Chicago should have expressly and clearly stated that the funds collected from the sale of its capital shares would be used *exclusively* for the purchase of shares of the companies of the Insull group, as was actually done and seems to have been the real objective of the company. In fact, the object of the company, as stated in the statutes, leaves the suspicion that the company aimed, by the contributions of the public, chiefly at reinforcing the Insull group and especially those of its companies which, by reason of the impending general crisis, could not directly raise fresh capital by loans or new shares. But this in itself does not necessarily imply fraudulent intent on the part of the accused, who was entitled, under the statutes, to invest the company's capital in any securities.

It has been made clear in the present hearing that none of the companies of the Insull group (most of which were operating companies) had as yet suffered any reverses through ill-considered or unsuccessful operations; and the temporary difficulties in which they found themselves gave rise to no reasonable apprehension or even suspicion of impending collapse if affairs had followed their usual and normal course. The accused, in believing in a successful outcome for the companies of the group and in having participated out of his own property in the foundation of the Corporation Securities Company of Chicago, was manifestly not inspired by any malevolent intentions. This is shown by the early history of the Corporation Securities Company of Chicago, when the company, under normal conditions, realized a profit of \$103,000 through dividends on securities purchased and held by it. But also the fact that the accused later on borrowed in his personal capacity various sums for the needs of the company, shows the absence of any underhand intentions on his part. Moreover, his attitude in the face of a great and unforeseen general disaster, which swept everything away and spared nobody, does not appear to have been actuated by any fraudulent intent. A dispassionate review of the facts

leaves the impression that this inglorious termination of a great and useful career was as heavy a blow to him as to any one else.

It is, of course, undeniable that the accused, together with his associates, did not hesitate to commit an act which is forbidden both by the moral law and the criminal law of all countries. It has been clearly shown and established by documentary evidence that, for the purpose of creating a high price for the Corporation Securities Company's shares, by means of fraudulent and illegal sales and purchases of shares on the Chicago Stock Exchange, in which there was no change of ownership, he succeeded in maintaining the Corporation Securities Company's shares at a high price at a time when these shares had a real value far below that which, through this Satanic artifice, was registered on the Stock Exchange bulletins. Huling, the most important of the witnesses, in his long testimony (especially Vol. 1, p. 303) states that from official documents he was firmly convinced that such fictitious and fraudulent transactions were performed in the year 1930 to the extent of 19.89 per cent. and in 1931 of 27.51 per cent. of the whole number of common shares sold. It is evident that by this artifice the public was deceived into the belief that the Corporation Securities Company shares had the value shown in the Stock Exchange bulletins, whereas their liquidating or real value had declined to zero (Huling, pp. 304, 305). And for the surer success of the said artifice and the more complete deception of the public, the Corporation Securities Company used to pay the tax and broker's commission on every such fictitious transaction. These are manifestly immoral acts which no self-respecting person can commit; but unfortunately they are not unusual in the administration of corporations, where the dominant idea is to bolster up the corporation's credit by any means.

These acts on the part of the accused, constituting, as they do, a violation of written and unwritten law, but bearing no relation to the case under discussion, and performed at a time when the post-war financial whirlwind in America was sweeping away everything and overthrowing in an instant all values, irrespectively of their intrinsic solidity, must not be judged with the same measure of severity as would apply to normal conditions; and in any case the said acts can not in any way have been the cause of the company's subsequent bankruptcy. There can be no question that the said acts aimed at a contrary result in that they constituted an effort to save the company's credit in an entirely unforeseen emergency, which was bringing everything to the ground, without regard to antecedents. To retain what one has obtained through long years of work and effort is a universal human instinct, wherever man is not a fatalist, prepared to surrender himself without a struggle and to renounce any hope of future recovery. There was no other more legitimate and less drastic

means of self-defense open to the accused, who was responsible to those who had shared in his enterprises. Lastly, these acts which tended to avert bankruptcy, aimed at no objective that comes under the bankruptcy laws.

It is also undeniable that, as set forth in the first count, which is the only one under consideration, by unanimous decision of the executive committee, to which the accused subsequently gave his approval (see Huling's testimony, pp. 313-314, with the references given there to the exhibits), on November 2, 1931, an expenditure was made of \$558,120 for the payment of a dividend to the holders of the preferred stock, of which the accused was one and received the sum of \$31,539, as well as the other members of the company's Board of Directors (see Huling, Vol. 2, p. 317, and exhibits Nos. 20 and 26). On the same day, the Corporation Securities Company borrowed \$250,000 from the Insull Utilities, with the approval of the Corporation Securities Company's executive committee, in which approval the accused took part, as shown by the documents (Vol. 2, Exhibit 13). On the same day, this loan was approved by the finance committee of the Insull Utilities Investments, under the chairmanship of the accused (see Exhibit 13). This loan was destined to help in the payment of the said dividend; it was given at $4\frac{1}{2}$ per cent. interest per annum and was secured by collateral. It can not be denied by any one that at the time when the said dividend was declared, the Corporation Securities Company was insolvent in the meaning of the American law. At that time, not through any unsuccessful venture, but solely by reason of the general depreciation of values, the Corporation Securities Company from September, 1931, on, had an excess of liabilities over its assets amounting to \$11,232,867.10, which excess by December 31, 1931, had risen to \$28,972,868.77 (see Huling, pp. 254 and 255). As is set forth in detail in Huling's testimony (pp. 253, 254), where the accounts are based upon the liquidating value of the share capital (a system adopted at first, but only *for a short time* by the officers of the Corporation Securities Company), that is, the net assets remaining to the shareholders after payment of all the company's debts, and calculating the net assets at the liquidating value of the securities, a surplus was found in the period prior to December 31, 1930, and a slight improvement in the financial position of the Corporation Securities Company owing to the advance of the prices of its securities on the stock market. But there were no surpluses at the time of the payment of the dividends, and these appear really to have been paid out of nonexistent profits. These tactics, which are a very common practice in corporations for maintaining the company's credit at all costs, are not presented in the indictment as a separate offense, and do not seem in any case to have been committed with fraudulent intent on the part of the accused and his associates, who firmly believed in the maintenance of the high prices of the shares against the great and

abrupt fluctuations to which they were exposed at that time and which made it impossible to evaluate the assets on the basis of any steady prices. Nor has it been proved that the dividend which was paid and which was manifestly an insignificant sum as compared with the company's total assets, brought about the company's bankruptcy. Nor can this act, which benefited an entire class of shareholders impartially, be classed under "transfers" in the sense of the American law; nor does it defeat the operation of the Bankruptcy Act. Lastly, evidence of fraud can not be gathered from the mere fact that the accused received personally the insignificant sum of \$31,539 as a dividend upon his shares, when it is remembered that he received no salary as President of the Corporation Securities Company and that he secured for the Corporation Securities Company against his own personal interest the loan to the company of \$250,000 to cover nearly one-half of the sum needed for the payment of the dividend, and that this precarious loan was granted by another company in which he had great financial interests.

As regards the transfers on which the remaining four counts are based, which transfers were made in December, 1931, and January, 1932, at a time when the Corporation Securities Company was in a state of insolvency, and which were transfers of securities and cash as additional collateral to existing creditors, and a partial payment to one of these creditors, the following may be said: In the first place, there is not the slightest proof of any private bond by reason of which the accused and his associates gave preferential treatment to these real creditors of the Corporation Securities Company at a time when the company was struggling against insuperable difficulties due entirely to the general financial crisis and when the imminent danger of irreparable disaster to all concerned rendered it necessary to make these preferential transfers in order to avert the immediate collapse of the company, which would have had far-reaching and disastrous consequences.

It is undeniable that the Corporation Securities Company, with a view to a temporary adjustment of things until the storm should have passed away, from which every one was seeking to save himself at any sacrifice, endeavored, by the so-called "Standstill agreement" (see testimony of the witness F. Jackson, p. 83) to obtain the creation of a stationary condition of things. But in this matter the company encountered a categorical refusal on the part of the banks, which unreasonably demanded an immediate settlement, and it was forced to comply with this demand in order to save whatever was possible, in the hope of better days. In so doing the officers of the Corporation Securities Company were actuated by no evil intentions and were not aiming at the frustration of the operation of the Bankruptcy Act, since the latter in any case can annul any such acts without

loss to the whole body of creditors, inasmuch as the creditors who were thus given preferential treatment are solvent up to the present day. Any one would have acted thus in order to forestall bankruptcy and would not hesitate to give the additional collateral demanded by the said creditors, whereby, if the situation had developed otherwise, no one would have suffered any loss and a state of things would have been forestalled which no one desired.

Likewise, the part payment in cash of \$1,000,000 to the Central Hanover Bank, etc., against its pre-existing claim for \$5,000,000 was effected under the same circumstances and without any intention of a preferential payment to the detriment of the other creditors. On the other hand, it has in no way been proved that the foregoing acts, performed without fraudulent intent, brought about the company's bankruptcy. The bankruptcy was not caused by these transfers of collateral, which subsequently lost the greatest part of their market value through depreciation; this rapid depreciation of itself, even without the said transfers, would have led to bankruptcy, and the latter was actually staved off for a time by the said transfers.

Lastly, it must not be overlooked that the petition in bankruptcy (April 16, 1932) was not filed for a long time after the Corporation Securities Company became insolvent, and that it was not until May, 1933, that the prosecution of the accused began, who in the meantime had left the country with the good wishes of a goodly number of his fellow-citizens, after having ceded to his creditors his entire real property in the United States. All these facts show that even in the United States the acts committed by the accused were at first not considered fraudulent or as independent of the general financial crisis.

By all the foregoing considerations, the majority of this court is led to the conclusion that at present there is not sufficient evidence to justify the commitment for trial of the accused.

IV. WHEREAS, upon the rejection of the application for extradition, the seizure as evidence of things belonging to the accused should be remitted and the said things should be restored to him.

NOW THEREFORE, the court refuses the aforesaid application of the United States of America for the extradition of Samuel Insull, Senior, and offers the opinion that there is no lawful ground for his extradition to the United States of America.

It annuls warrant No. 263 issued on August 25, 1933, by the President of this court for the arrest of Samuel Insull, Senior, and provisionally ratified by the Council of this court by its decision No. 118/1933.

It orders the setting at liberty of the said Samuel Insull, Senior, if his detention is not necessary for any other reason.

It orders the remission of the seizure made on August 26, 1933, by Capt. P. Tsingris, of the General Safety Service, of various documents and letters belonging to Samuel Insull, Senior, and placed in a sealed leather valise, and the return of these effects to their owner.

Done, adjudged and published at Athens at a public sitting of this court in its courtroom on October 31, 1933.

D. G. CHRONAIOS, *Clerk*

E. PANEGYRAKIS, *President*

§ 109. THE RULE OF DOUBLE CRIMINALITY (*Concluded*)

NOTE BY THE EDITOR

The United States responded to the decision of the Greek Court in the Insull case by giving notice of the termination of the American-Hellenic Treaty of Extradition signed on May 6, 1931. The text of the American Note delivered to the Greek Government on November 6, 1933, follows:

I am instructed to inform Your Excellency that the United States Government has learned with astonishment that the Greek authorities have again declined to honor the request of the United States for the extradition of Samuel Insull, a fugitive from American justice.

My Government finds it difficult to reconcile this unusual decision with the admission of the competent authorities that the fugitive committed the acts with which he was charged and that these acts are illegal and fraudulent both in the United States and Greece. Without going into the details of the decision, it is evident that the authorities attempted actually to try the case instead of confining themselves to ascertaining whether the evidence submitted by the United States Government was sufficient to justify the fugitive's apprehension and commitment for trial. There can be no doubt that the question of criminal intent referred to by the Hellenic Government would be fairly and judiciously passed upon by the courts of the United States. I am to add that my Government considers the decision utterly untenable and a clear violation of the American-Hellenic Treaty of Extradition signed at Athens on May 6, 1931.

Inasmuch as the Greek authorities have now seen fit on two occasions to deny the just requests of the United States made under the provisions of the above-mentioned Treaty, it is apparent that this Treaty, though similar in terms to treaties which the United States has found effective in extraditing fugitives from other countries, cannot be relied upon to effect the extradition of fugitives who have fled to Greece. My Government therefore considers that from an American point of view the Treaty is entirely useless. Accordingly I am instructed to give formal notice herewith of my Government's denunciation of the Treaty with a view to its termination at the earliest date possible under its pertinent provisions.¹

¹ Department of State, *Press Releases*, No. 215 (1933), pp. 257-258.

The objection of the United States was eventually met without termination of the Treaty, however, by the ratification of an executive agreement ("Protocol") signed September 2, 1937, as follows:

Whereas a difference has arisen between the Government of the United States of America and the Government of Greece with respect to the proper interpretation of Article I of the Treaty of Extradition concluded on May 6, 1931, between the United States and Greece, and in particular, with respect to the final clause of such Article which reads as follows:

"*Provided*, That such surrender shall take place only upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had been there committed."

Whereas it is desirable that such differences should be resolved, it is agreed as follows:

The final clause of Article I of the Treaty of Extradition concluded on May 6, 1931, between the United States and Greece, shall, from and after this date, be understood to mean that the court or magistrate considering the request for extradition shall examine only into the question of the sufficiency of the evidence submitted by the demanding Government to justify the apprehension and commitment for trial of the person charged; or in other words, whether the evidence discloses probable cause for believing in the guilt of the person charged. It is further understood that the quoted treaty provisions do not signify that the court or magistrate is authorized to determine the question of the guilt or innocence of the person charged.²

Most extradition treaties of the United States contain provisions similar to the one in the treaty of 1842 with Great Britain that fugitives should be surrendered only "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had been there committed" (Art. X). This is not to be understood as a treaty requirement that in order to justify extradition the act with which the fugitive is charged must be punishable under the laws of both the requesting State and the State of asylum. On this point *Factor v. Laubenheimer* does not seem open to criticism, though its denial of a general principle of double criminality is much criticized. Nevertheless, the difference between the practice of the United States and Great Britain, on the one hand, and a considerable number of civil law States, on the other, in construing provisions like Article X has led to confusion between the two principles which is typified by the controversy over the celebrated *Insull* case. In its judgment of October 1, 1933, the Greek Court of Appeals, though formally deciding only that "at present there is not sufficient evidence to

² *Executive Agreement Series*, No. 114.

justify the commitment for trial of the accused," used language which led the United States to declare that "the authorities attempted actually to try the case instead of ascertaining whether the evidence submitted by the United States Government was sufficient to justify the fugitive's apprehension and commitment for trial," and to terminate the treaty. The Greek Court of Appeals did use language to the effect that the treaty embodied the principle of double criminality for offenses against the bankruptcy laws, which would be contrary to the principle of construction on this point in *Factor v. Laubenheimer*; and it not only examined the question whether acts complained of were criminal under Greek law—on which question it found in the affirmative—but also whether the charges were "well founded"; on which, apparently finding in the negative, the Court concluded that there was not sufficient evidence to justify the accused's apprehension and commitment for trial.

The whole incident is especially interesting since the United States has traditionally required, by language similar to that cited in the treaty with Greece, and by statute, that the requesting State make out before a judicial officer a *prima facie* case against the alleged fugitive. In the language of the United States *Revised Statutes*, the accused is to be brought before a judicial officer "to the end that the evidence of criminality may be heard and considered," and if, "on such hearing, he deems the evidence *sufficient to sustain the charge* [italics supplied] under the provisions of the proper treaty or convention, he shall certify the same . . . to the Secretary of State . . ." Sec. 5270. Says the Harvard Research:

With very few exceptions, treaties, to which neither the United States nor Great Britain is a party, either expressly negative the requirement of any proof of guilt beyond the warrant of arrest, or contain no provision on the subject. . . .

Civil Law States generally accept a warrant of arrest, which states the nature of the act charged, as sufficient evidence of guilt on the part of the person claimed to justify extradition.

In support of the last sentence numerous treaties and statutes are cited, including four treaties to which Greece is a party. The Harvard Research continues:

The development of the doctrine of the *prima facie* case in Great Britain and the United States in extradition proceedings seems to rest partly on the suspicion of inadequacy of proceedings under other systems of law, and partly upon the feeling that one who is within the State is entitled to the protection of the State's system of criminal procedure, as well when he is accused of a crime abroad, as when he is accused of a crime within the requested State.³

³ 29 *A.J.I.L.* (Supp., January and April, 1935), 193, 194.

The Harvard Research Draft in general follows the rule accepted outside Great Britain and the United States. See Articles 12 and 17, and Comment thereon.

It is certainly possible to read the decision of the Greek Court of Appeals as a Greek application of the American rule that the evidence must be deemed by the judicial officer "sufficient to sustain the charge." Mr. Insull was later extradited from Turkey after leaving Greece, and on his trial in the United States he was acquitted. He was widely denounced publicly in the United States, and there is no doubt that the denunciation of the treaty by the United States was a politically popular act.⁴

As a result of *Factor v. Laubheimer* a person whose extradition from the United States is sought may be extradited even though the act of which he is accused is not a crime under the law of the State where he is found or under any Federal law. *Factor v. Laubheimer* is a long backward step, from the point of view of those who believe that, with a few specific exceptions like political offenses (see page 537), States should adopt the idea of double criminality as a basic principle and grant extradition generally in cases where the act complained of is criminal under the laws of both States. Thus Judge Hudson, who regards it as established by previous Supreme Court decisions⁵ that an offense is only extraditable in the United States if the acts charged are criminal by the laws of both countries, believes that so far as possible the method pursued by the United States of listing particular crimes in extradition treaties should be supplanted by a general treaty provision based on the principle of double criminality, like that of the Montevideo Convention of 1933 (see page 495). "If this policy were adopted, it would be made clear that in the United States the test of criminality is to be furnished by the law of the place of asylum."⁶ Judge Hudson believes that *Factor v. Laubheimer* "is to be confined to its facts. It may possibly be distinguished in the future because of the extent to which the act charged against Factor was made punishable in states other than Illinois. It applies only to provisions of the treaties with Great Britain, which are to be superseded to some extent by the treaty of December 22, 1931."⁷ Under that treaty, however, none of the twenty-seven classes of offenses listed contain any reference to the principle of double criminality, although "extradition is also to be granted for participation in any of the aforesaid crimes or offences, provided that such

⁴ But see C. C. Hyde, in 28 *A.J.I.L.* (1934), 307.

⁵ *Wright v. Henkel* (1903) 190 U. S. 40, 58; *Collins v. Loisel* (1922) 259 U. S. 309, 311.

⁶ P. 306 of an extraordinarily illuminating article, "The Factor Case and Double Criminality in Extradition," 28 *A.J.I.L.* (1934), 274.

⁷ *Ibid.*, 305.

participation be punishable by the laws of both High Contracting Parties.”⁸ Article 9 contains the customary proviso that “the extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party applied to . . . to justify the committal of the prisoner for trial, in case the crime or offence had been committed in the territory of such High Contracting Party.” One can hardly have confidence that *Factor v. Laubenheimer* will be abandoned.

§ 110. POLITICAL OFFENSES

In Re Castioni

GREAT BRITAIN, QUEEN’S BENCH DIVISION, 1890

[1891] 1 Q. B. 149.

APPLICATION for habeas corpus.

The motion was made on behalf of Angelo Castioni, for an order nisi calling upon the Solicitor to the Treasury, Franklin Lushington, Esq., a metropolitan police magistrate, and the consul-general of Switzerland, as representative of the Swiss Republic, to shew cause why a writ of habeas corpus should not issue to bring up the body of Castioni in order that he might be discharged from custody.

The prisoner Castioni had been arrested in England on the requisition of the Swiss Government, and brought before the magistrate at the police court at Bow Street, and by him committed to prison for the purpose of extradition, on a charge of wilful murder alleged to have been committed in Switzerland.

The facts, which were contained in depositions sent from Switzerland, in the depositions taken before the magistrate at Bow Street, and in affidavits used on the hearing of the motion, were shortly as follows:

The prisoner was charged with the murder of Luigi Rossi, by shooting him with a revolver on September 11, 1890, in the town of Bellinzona, in the canton of Ticino in Switzerland. The deceased, Rossi, was a member of the State Council of the canton of Ticino, and was about twenty-six years of age. The prisoner, Castioni, was a citizen of the same canton; he had resided for seventeen years in England, and arrived at Bellinzona on September 10, 1890. For some time previous to this date much dissatisfaction had been felt and expressed by a large number of the inhabitants of Ticino at the mode in which the political party then in power were conducting the government of the canton. A request was presented to the Government for a revision of the constitution of the canton, under art. 15 of the constitution, which provides that “The constitution of the canton

⁸ Article 4; italics supplied.

may be revised wholly or partially. . . . (b) At the request of 7000 citizens presented with the legal formalities. In this case the Council shall within one month submit to the people the question whether or not they wish to revise the constitution," and a law of May 9, 1877, prescribes the course to be adopted for the execution of letter (b) of art. 15. The Government having declined to take a popular vote on the question of the revision of the constitution, on September 11, 1890, a number of the citizens of Bellinzona, among whom was Castioni, seized the arsenal of the town, from which they took rifles and ammunition, disarmed the gendarmes, arrested, and bound or handcuffed, several persons connected with the Government, and forced them to march in front of the armed crowd to the municipal palace. Admission to the palace was demanded in the name of the people, and was refused by Rossi and another member of the Government, who were in the palace. The crowd then broke open the outer gate of the palace, and rushed in, pushing before them the Government officials whom they had arrested and bound; Castioni, who was armed with a revolver, was among the first to enter. A second door, which was locked, was broken open, and at this time, or immediately after, Rossi, who was in the passage, was shot through the body with a revolver, and died very soon afterwards. Some other shots were fired, but no one else was injured. Two witnesses, who were present when the shot was fired, and were called before the magistrate at Bow Street, identified Castioni as the person who fired the shot. One of the witnesses called for the prisoner was an advocate named Bruni, who had taken a leading part in the attack on the municipal palace. In cross-examination he said: "The death of Rossi was a misfortune, and not necessary for the rising." There was no evidence that Castioni had any previous knowledge of Rossi. The crowd then occupied the palace, disarmed the gendarmes who were there, and imprisoned several members of the Government. A provisional government was appointed, of which Bruni was a member, and assumed the government of the canton, which it retained until dispossessed by the armed intervention of the Federal Government of the Republic.

The magistrate was of opinion that the identification of Castioni was sufficient, and held upon the evidence that the bar to extradition specified in s. 3 of the Extradition Act, 1870, did not exist, and committed Castioni to prison.

[Argument of counsel omitted.]

DENMAN, J. . . . I am unable to entertain a doubt that this is a case in which we ought to order that the prisoner be discharged.

There has been no legal decision as yet upon the meaning of the words contained in the Act of 1870, upon the true meaning of which this case mainly depends. . . . I do not think it necessary or desirable that we should

attempt to put into language in the shape of an exhaustive definition exactly the whole state of things, or every state of things which might bring a particular case within the description of an offense of a political character. . . .

It seems to me that it is a question of mixed law and fact—mainly indeed of fact—as to whether the facts are such as to bring the case within the restriction of s. 3, and to shew that it was an offence of a political character. I do not think it is disputed, or that now it can be looked upon as in controversy, that there was at this time existing in Ticino a state of things which would certainly shew that there was more than a mere small rising of a few people against the law of the State. I think it is clearly made out by the facts of this case that there was something of a very serious character going on—amounting, I should go so far as to say, in that small community, to a state of war. There was an armed body of men who had seized arms from the arsenal of the State; they were rushing into the municipal council chamber in which the Government of the State used to assemble; they demanded admission; admission was refused; some firing took place; the outer gate was broken down; and I think it also appears perfectly plain from the evidence in the case that Castioni was a person who had been taking part in that movement at a much earlier stage. He was an active party in the movement; he had taken part in the binding of one member of the Government. Some time before he arrived with his pistol in his hand at the seat of government, he had gone with multitudes of men, armed with arms from the arsenal, in order to attack the seat of government, and I think it must be taken that it is quite clear that from the very first he was an active party, one of the rebellious party who was acting and in the attack against the Government. Now, that being so, it resolves itself into a small point, depending on the evidence which was taken before the magistrate, and anything that we can collect from the evidence that we have before us and from the whole circumstances of the case. . . . [The Judge's discussion of certain evidence is omitted.]

. . . I have carefully followed the discussion as to the facts of the case, and if it were necessary I could go through them all one by one, and point out, I think, that, looking at the way in which that evidence was given, and at the evidence itself, there is nothing in my judgment to displace the view which I take of the case, that at the moment at which Castioni fired the shot the reasonable presumption is, not that it is a matter of absolute certainty (we cannot be absolutely certain about anything as to men's motives), but the reasonable assumption is that he, at the moment knowing nothing about Rossi, having no spite or ill-will against Rossi, as far as we know, fired that shot—that he fired it thinking it would advance, and that it was an act which was in furtherance of, and done intending it to be in furtherance of,

the very object which the rising had taken place in order to promote, and to get rid of the Government, who, he might, until he had absolutely got into the place, have supposed were resisting the entrance of the people to that place. That, I think, is the fair and reasonable presumption to draw from the facts of the case. I do not know that it is necessary to give any opinion as to the exact moment when the shot was fired; there is some conflict about it. There is evidence that there was great confusion; there is evidence of shots fired after the shot which Castioni fired; and all I can say is, that looking at it as a question of fact, I have come to the conclusion that at the time at which that shot was fired he acted in the furtherance of the unlawful rising to which at that time he was a party, and an active party—a person who had been doing active work from a very much earlier period, and in which he was still actively engaged. That being so, I think the writ ought to issue, and that we should be acting contrary to the spirit of this enactment, and to the fair meaning of it, if we were to allow him to be detained in custody longer.

[The opinions of Hawkins and Stephen, JJ., are omitted.]

§ 111. POLITICAL OFFENSES (*Continued*)

NOTE BY THE EDITOR

Compare Article 6 of the Extradition Treaty of 1931 between the United States and Great Britain, above, page 498. The Harvard Research, in commenting on Article 5 of its Draft Convention permitting a State to "decline to extradite a person claimed if the extradition is sought for an act which constitutes a political offense, or if it appears to the requested State that the extradition is sought in order that the person claimed may be prosecuted or punished for a political offense," declares: "The use of the permissive form in treaties with respect to non-extradition for political offenses is decidedly the exception rather than the rule; the great majority of treaties and draft conventions examined contain provisions phrased in mandatory form either precluding the requested State from surrendering a person sought for a political offense, or enjoining the requested State from seeking the extradition of a person accused of a political offense. The treaties to which the United States is a party are mandatory on this point, although negative in form."¹

Political offenses are, however, very difficult to define, even though it is agreed that the state of the asylum is entitled to define them under its own

¹ Harvard Research, "Extradition," *loc. cit.*, pp. 107, 109. See Article 6 of the extradition treaty between the United States and Great Britain, above, page 498, and the general treatment in the Harvard Research, pp. 107-119.

law. *In re Castioni* above presents an instance where the killing was clearly incidental to a political commotion. Suppose, however, the killing is done in private by a member of a secret organization having political purposes. The Supreme Court of Justice of Guatemala in 1929 permitted the extradition of an officer of the "Black Army," an organization sworn to keep order and repress Communism in Germany, who had ordered a subordinate to kill another member of the organization suspected of being a spy. The Court held that this was a common crime, and approved the statement of the Ministry of Foreign Relations "that the fact that Eckermann formed part of a patriotic society secretly organised to cooperate in the defence of his country, cannot in any way give the character of political crimes to those committed by its members. . . . Universal law qualifies as political crimes, sedition, rebellion and other offences which tend to change the form of Government of the persons who compose it; but it cannot be admitted that ordering a man killed with treachery; unexpectedly and in an uninhabited place, without form of trial or authority to do it, constitutes a political crime."² And what of the case where the fugitive is accused of having assassinated the head of a State? In 1934 the Court of Appeal of Turin, Italy, refused extradition from Italy of two persons charged with the assassination of King Alexander of Yugoslavia and M. Barthou, French Minister of Foreign Affairs, in Marseilles, France. The Court regarded the crimes as political, under treaties with France and Italian legislation.³

The Harvard Research found that there was no satisfactory and generally acceptable definition of a political crime for purposes of extradition. Treaties lay down various tests, "not for the purpose of defining, but excluding from, the category of non-extraditable political offenses," which the Harvard Research classifies, with many citations, as follows:

(1) Treaties incorporating the so-called theory of predominance, or the Swiss theory, according to which an offense is not a non-extraditable political offense if—although committed in furtherance of a political objective—the common crime element predominates.

(2) Treaties incorporating, in various forms, the so-called *attentat* or Belgian clause, according to which murder or attempt at life of the head of a State, or a member of his family (sometimes enumerated), or sometimes of a member of the government, shall not be considered a political offense.

(3) Treaties incorporating what may be called the "unqualified" *attentat* clause, according to which murder or attempt at life in general—that is to say, without reference to head of a state or of a government—is not a political offense unless committed in "open battle."

² Annual Digest, 1929-1930, 293, as translated from the Spanish in 26 *Gaceta de los Tribunales* (n. 35), p. 992.

³ Case of Pavelitch and Kvaternik, 76 *Monitore dei Tribunali* (1935) as translated in Hudson, *Cases* (2d Ed.), 945.

(4) Treaties providing that anarchism or communistic activity does not constitute a political offense.⁴

The definition proposed by the Harvard Research itself is broad, but does not deal effectively with the question of what are not political offenses: "the term 'political offense' includes treason, sedition and espionage, whether committed by one or more persons; it includes any offense connected with the activities of an organized group directed against the security or governmental system of the requesting State; and it does not exclude other offenses having a political objective."⁵

It is perhaps worthy of note that the Harvard Research included in Article 6 of its Draft Convention a provision that a State "may decline to extradite a person claimed if the extradition is sought for an act which constitutes a military offense, or if it appears to the requested State that the extradition is sought in order that the person claimed may be prosecuted or punished for a military offense."⁶ "The inclusion of this article seems desirable," according to the Comment, "in view of the general disinclination of States to extradite persons sought for offenses against the military laws."⁷

An elaborate *Convention for the Prevention and Punishment of Terrorism*, signed at Geneva November 16, 1937,⁸ provides for punishment of terroristic acts by each signatory State, and for the extradition of persons accused of such acts (Article 8). It is declared that (Article 1) "the High Contracting Parties, reaffirming the principle of international law in virtue of which it is the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State and to prevent the acts in which such activities take shape, undertake as hereinafter provided to prevent and punish activities of this nature and to collaborate for this purpose." Acts of terrorism are defined as "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public."

The Parties agree (Article 2) to make the following acts committed on their own territories criminal offenses "if they are directed against another Party and if they constitute acts of terrorism within the meaning of Article 1: (1) Any wilful act causing death or grievous bodily harm or loss of

⁴ Pp. 114, 115.

⁵ *Ibid.*, pp. 112-113. On political offenses in extradition see L. Deere, "Political Offenses in the Law and Practice of Extradition," 27 *A.J.I.L.* (1933), 247; Moore, *Extradition* (1891), I, 303; Piggott, *Extradition* (1910), p. 44; Moore, *Digest*, VI, 332; *In re Meunier* (Great Britain, 1894) 2 Q. B. 415 (terrorist explosions causing death); C. C. Hyde, "Notes on the Extradition Treaties of the United States," 8 *A.J.I.L.* (1914), 487; Harvard Research, "Extradition," *loc. cit.*, 107-119, and references at the end of this chapter.

⁶ P. 119.

⁷ P. 122.

⁸ Text in League of Nations *Official Journal* (January, 1938), p. 23. In August, 1939, the Convention had been ratified only by India.

liberty to: (a) Heads of states, persons exercising the prerogatives of the head of the State, their hereditary or designated successors; (b) The wives or husbands of the above-mentioned persons; (c) Persons charged with public functions or holding public positions when the act is directed against them in their public capacity. (2) Wilful destruction of, or damage to, public property or property devoted to a public purpose belonging to or subject to the authority of another High Contracting Party. (3) Any wilful act calculated to endanger the lives of members of the public. (4) Any attempt to commit an offense within the foregoing provisions of the present article. (5) The manufacture, obtaining, possession, or supplying, of arms, ammunition, explosives or harmful substances with a view to the commission in any country whatsoever of an offence falling within the present article."

Article 3 provides that each Party "shall make the following acts criminal offences when they are committed on his own territory with a view to an act of terrorism falling within Article 2 and directed against another . . . Party, whatever the country in which the act of terrorism is to be carried out: (1) Conspiracy to commit any such act; (2) Any incitement to any such act, if successful; (3) Direct public incitement to any act mentioned under heads (1), (2) or (3), whether the incitement be successful or not; (4) Wilful participation in any such acts; (5) Assistance knowingly given, towards the commission of any such act."

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QUESTIONS AND PROBLEMS

Students are urged to read all the materials in the chapter before attempting to answer the questions.

1. What States are parties to the Extradition Treaty in § 102? What article of the Treaty contains the nub of their agreement? To what do they agree? Of what importance is Article 3? Can you think of any offenses not mentioned in Article 3? What do you think the parties intended as to offenses they did not mention? Would offenses not mentioned be extraditable as a matter of general international law?

2. An Extradition Treaty of September 3, 1930, between Germany and Turkey, contains the following provision:

"Art. 3, 1. The Contracting Parties undertake, in cases of extradition with a view to proceedings at criminal law, to grant extradition if the offense in respect of which extradition has been applied for is punishable, according to the law of both Parties, by imprisonment for at least one year or by a severer penalty than imprisonment. . . ."

Subsequent articles except from this principle certain political and military offenses.

How does this compare with the corresponding provision in the Extradition Treaty between United States and Great Britain printed as § 102? Which of these principles of stating what offenses are subject to extradition is most widely adhered to in extradition treaties? Which in your judgment is the better principle? Discuss.

3. What is the significance of the provisions of the United States Criminal Code printed as § 104? Discuss its relation to the Convention on Extradition between the United States and Great Britain.

4. What is the significance of the Memorandum of the Department of State printed as § 105? Its legal importance? Is it related in any way to the Convention on Extradition printed as § 102? To the provisions of the Criminal Code printed as § 104? Explain.

5. Mr. H is found in St. Paul, having disappeared from Winnipeg after learning the police sought him on suspicion of kidnaping. The Canadian Government seeks his extradition. As far as this can be done from the documents printed, list the different steps in the required procedure.

6. Make a list as in question 5 with this difference: Mr. H is found in Winnipeg while he is being sought by the police in St. Paul, and the Minnesota authorities seek his extradition.

7. Mr. R is indicted for criminal syndicalism in California, but jumps his bail and is next heard from in the British sphere of influence in Ethiopia (in 1933). Discuss the questions which would be raised, and the procedure in such a case, if Mr. R's extradition were applied for. Would it make any difference if he appeared in Dublin? In the territories of the Gaekwar of Baroda?

8. Mr. Z is apprehended in the United States for a forgery alleged to have been committed in Canada. The judge in a Wisconsin court decides that the evidence justifies his commitment. What evidence would this be? Three months later, no duly authorized officer of Canada having appeared to assume custody of the prisoner, Mr. Z seeks his discharge. Decision and reasons?

9. In the case of Mr. Z above, will the evidence presented to the Wisconsin judge be in the forms to which he is accustomed, or in the forms required by the applicable Canadian law? Is the Wisconsin judge presumed to know the law and procedure in this respect of every State which may seek the extradition of a person from the United States? What is the statutory rule governing this matter? Do you think it is a wise rule?

10. For what principle is *United States v. Rauscher* (§ 106) important? Discuss.

11. What were the facts in the case of *Insull* (§§ 108, 109) as presented to the Greek court? What issues of law were presented? What was the court's judgment? What were the principal grounds on which the judgment was based?

What was the function of the Greek court under the circumstances? Was it to try *Insull*? Explain. Did the court examine the question as to whether there was sufficient evidence to hold *Insull* under American law? Under Greek law? Explain. Did the court conclude that the offenses with which *Insull* was charged

were not offenses under Greek law? On the facts as presented, do you think the Court's conclusion was justified? Was there any doubt as to what acts had been done by Insull? As to Insull's intent in doing these acts? Was the distinction important?

12. Do you think the United States was justified in denouncing the extradition treaty with Greece?

13. What were the facts in *Factor v. Laubenheimer* (§107)? What questions of law were presented for decision? What was the judgment of the Court? What were the principal grounds on which the judgment was based?

What was the offense with which the petitioner was charged? Was this an offense under laws of the United States? Of Illinois? Of other States? What is the significance of the judgment in relation to these questions?

What part was played in the Court's reasoning by the Treaty of 1842? Of 1889? The Dawes-Simon Treaty? Is the Court's judgment based on construction of the treaties, or on other evidence? What part was played by attitudes taken by the two Governments in correspondence concerning the treaties? By the principle of reciprocity of treaty obligations?

14. Stage a debate on *Factor v. Laubenheimer*. Those opposing the judgment of the Court should carefully read in the Reports the whole of Justice Butler's dissent.

15. What were the facts in *In re Castioni* (§110)? What was the precise question before the Court? How was this question decided?

Was the decision of the Court based upon the extradition treaty in this case? What was the Act of 1870? Did Switzerland have to be satisfied with a judgment rendered in these terms, or would she have been justified in taking further action? Discuss.

What is a "political offense"? Was evidence offered to show that Castioni did not kill Rossi? What characteristics differentiated the act of Castioni from murder? Do you think this is a valid distinction? Discuss.

If the assassin of King Alexander of Yugoslavia had escaped to England from France, where the assassination took place, do you think the British courts would have taken the same attitude as they did in Castioni's case? Do you think they should take the same attitude?

16. Following is Article 6 of the extradition convention between Belgium and Poland, signed May 13, 1931:

"Extradition shall not be granted if the offence for which it is requested is regarded by the State applied to as a political offence or an act connected with such an offence.

"An attack made or attempted upon the person of a Head of State or the members of his family shall not be deemed to be a political offence or an act connected with a political offence when it constitutes assassination, murder or poisoning, or an attempt to commit or participation in such an offence."

Comment on this provision. Would this have covered a person who had attempted to assassinate the late Marshal Pilsudski and then escaped to Belgium?

17. Suppose that X, who was implicated in the burning of the German Reichstag building, has escaped to Chicago, and that, on grounds of arson, Germany requests his extradition under a treaty with the United States similar to that between the United States and Great Britain (§102).

- (a) Should the United States permit X to be extradited?
- (b) In seeking the extradition of X, would the German authorities have to prove him guilty of arson to the satisfaction of the American court? Would the court apply American or German law in such a case?
- (c) Suppose that X were extradited to Germany, and that the German authorities then tried him for treason. Would the United States be justified in taking any further action?

XII

Pacific Settlement of International Disputes

§ 112. METHODS OF PACIFIC SETTLEMENT

NOTE BY THE EDITOR

Clarity of thought in connection with methods of pacific settlement of international disputes requires some attempt at clear definitions. This is difficult when, as here, the method of treatment is essentially documentary, because it is desirable to see each document as a whole, and each document may embody several definitional concepts. For this reason it seems desirable to introduce here a series of definitions which may serve as tools in the consideration of the materials in the documents.¹

1. **Negotiation.**—This consists “in such acts of intercourse between the parties as are initiated and directed for the purpose of effecting an understanding, and thereby amicably settling the difference that has arisen between them.”² Examples: conferences of diplomatic representatives or heads of States. “Most treaties make a failure to settle a dispute by negotiation a condition precedent to arbitration or judicial settlement,”³ but this is not an indispensable prerequisite.

2. **Good offices, mediation.**—“§ 7. When parties are not inclined to settle their differences by negotiation, or when they have negotiated without effecting an understanding, a third State may be able to procure a settlement through its good offices or its mediation. Such assistance may have been asked for by one or both of the parties at variance, or it may have been spontaneously offered. Collective mediation is also possible, several States acting at the same time as mediators.

¹ The definitions, in each case except “5. *Judicial Settlement*,” are those in Lauterpacht’s (fifth) edition of L. Oppenheim, *International Law* (London, 1935), Volume II, reprinted by permission of Dr. Lauterpacht and Longmans, Green & Co.

² *Ibid.*, p. 8.

³ *Ibid.*, note.

"§ 8. As a rule, a third State has no duty to offer its good offices or mediation, or to respond to a request from conflicting States for this service, nor is it, as a rule, the duty of conflicting parties themselves to ask or to accept a third State's good offices and mediation. But by special treaty such a duty may be created. Articles 11 and 15 of the Covenant of the League constitute a treaty obligation of this nature.

"§ 9. A theoretical distinction exists between good offices and mediation. The difference between them is that, whereas *good offices* consist in various kinds of action tending to call negotiations between the conflicting States into existence, *mediation* consists in direct conduct of negotiations between the parties at issue on the basis of proposals made by the mediator. However, diplomatic practice and treaties do not always distinguish between good offices and mediation."⁴

(Compare Hague Convention of 1907 for the Pacific Settlement of International Disputes, Articles 2-8, § 114, pages 551-552 below.)

3. **Conciliation.**—"§ 11a. Conciliation is the process of settling a dispute by referring it to a commission of persons whose task it is to elucidate the facts and (usually after hearing the parties and endeavouring to bring them to an agreement) to make a report containing proposals for a settlement, but not having the binding character of an award or judgment.

"... It differs from Commissions of Inquiry in that their main object is the elucidation of the facts, in the hope that, once that difficulty has been overcome, the parties will of their own accord be able to settle the dispute; whereas the main object of conciliation is to enlist the active services of a commission of persons in bringing the parties to an agreement. It differs from arbitration and judicial settlement in that under conciliation the parties are under no legal obligation to adopt the proposals for a settlement which are suggested to them; whereas a legal obligation exists to comply with the award or judgment of a duly constituted tribunal.

"It is also desirable to distinguish conciliation from mediation by confining the term 'mediation' to cases where a third State endeavours to bring the parties together by conducting negotiations between them, and the term 'conciliation' to cases where the parties have referred the dispute to a body of persons primarily for the purpose of an impartial ascertainment of the facts and a suggestion of the appropriate lines of a settlement."⁵

(Compare Hague Convention of 1907 for the Pacific Settlement of International Disputes, Articles 9-36, § 114, pages 552-553; Kellogg Conciliation Treaty, § 120, page 594; Covenant of the League of Nations, Articles 11, 15; § 115, pages 563-564; and § 118, pages 593-594.)

⁴ *Ibid.*, pp. 9-10.

⁵ *Ibid.*, pp. 12-13.

4. **Arbitration.**—"§ 12. Arbitration in the broad sense means *the determination of a difference between States through a legal decision of one or more umpires or of a court chosen by the parties*. . . . Arbitration in the narrow sense of the term (and incidentally the sense familiar to Municipal Law) means the *determination of a difference between States by one or more umpires chosen, usually ad hoc, by the parties*; and their decision is called an *award*; whereas the decision of a court is called a *judgment*. It seems desirable, now that we have a Permanent Court of International Justice existing side by side with the Permanent 'Court' of Arbitration and many temporary arbitration tribunals, that the formal difference between the award of a tribunal of arbitration and the judgment of a court of justice should be clearly recognised by International Law. On the other hand, it is important not to attribute to that distinction any decisive importance beyond that inherent in the nature of the adjudicating body. The award of the arbitrator and the decision of the Court are both based on law.⁶

"§ 13. It is necessary . . . for such conflicting States as intend to have the conflict determined by arbitration to conclude a treaty by which they agree to this course. Such a treaty of arbitration imposes an obligation on both parties to submit in good faith to the decision of the arbitrators. Frequently a treaty of arbitration will be concluded after the occurrence of a difference; but it also frequently happens that States concluding a Treaty stipulate by the so-called Compromise Clause that any difference arising between them respecting matters regulated by the treaty shall be determined by arbitration. Two or more States can also conclude a so-called general treaty of arbitration stipulating that all or certain kinds of differences arising in future between them shall be settled by this method. . . .

"§ 14. States which conclude an arbitration treaty have to agree upon the arbitrators. . . .

"§ 15. The treaty of arbitration usually stipulates the principles according to which the arbitrators have to give their award. . . . In default of any express provision, it must be presumed that the award is to be given according to principles of International Law, or, if there are none applicable, according to the rules of equity. . . .

"§ 16. An arbitral award is final if the arbitration treaty does not stipulate the contrary, and is binding upon the parties. . . ."⁷

(Compare Hague Convention of 1907 for the Pacific Settlement of International Disputes, Part IV; § 114, page 553, below; Kellogg Arbitration Treaty, § 121, page 598, below; Geneva Protocol, § 117, especially Article 4,

⁶ *Ibid.*, pp. 22-23.

⁷ *Ibid.*, pp. 23-26.

page 586, below; awards of various arbitration tribunals in this volume, §§ 39, 43, 76, 77, and others.)

5. **Judicial settlement.**—Judicial settlement is similar to arbitration, and writers who separate it from arbitration usually discuss under it only the Permanent Court of International Justice established in pursuance of Article 14 of the Covenant of the League of Nations in 1922. This is the case with Oppenheim. The principal difference between arbitration and judicial settlement by the Permanent Court of International Justice is that while in the former judges are usually chosen for a particular dispute, in the latter judges are selected for a term of years for a Court which is always in being. Claims have been made that the latter is less likely to give “compromise” rather than “legal” decisions; but the argument that arbitration tribunals tended to give “compromise” decisions is hardly proved. The Court has jurisdiction over disputes which the Parties submit to it (though they may do so in advance); it applies law, unless the parties agree to have it decide *ex aequo et bono*; and parties are bound to give effect to its judgments.

The Statute of the Permanent Court of International Justice is printed as § 116 below. A Judgment of the Court is printed (in part) above as § 78.

Advisory Opinions of the Court, given at the request of the Assembly or the Council of the League of Nations, elucidate points of law in dispute between States. Advisory opinions are not binding upon States, though they have usually been adopted by the Council. Examples may be found in §§ 34, 72.

It is believed that even the most complex methods of pacific settlement can be said to consist of forms of these five general methods applied successively to the same dispute, with the method of their application depending upon the particular circumstances.

§ 113. THE OBLIGATION TO SETTLE DISPUTES BY PACIFIC MEANS

Under the terms of Article 2 of the General Treaty for the Renunciation of War (often referred to as the “Kellogg Pact,” “Kellogg-Briand Pact,” or “Pact of Paris”) printed below, most of the States of the world (see § 123) have agreed never to seek a solution of disputes between them except by pacific means. It is held by some that this requires these States to assume further positive obligations to submit their disputes to some machinery of settlement other than the use of force. The Treaty thus forms a suitable introduction to a number of treaties (§§ 114-116, 118, 119, 121) which do provide such machinery.

General Treaty for the Renunciation of War

(The "Kellogg Pact")

SIGNED AT PARIS, AUGUST 27, 1928¹*United States Treaty Series*, No. 796.

[Names of States] . . . Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this treaty; . . . [names of plenipotentiaries, etc.] have agreed upon the following articles:

ARTICLE I

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

ARTICLE II

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.²

¹ For ratifications and adhesions, see Table, § 123, below.—ED.

² A considerable controversy has centered around the meaning of the Kellogg Pact. Since both the negotiations and the text made it clear that ratifying States had not renounced wars in self-defense, and that each ratifying State had the right to interpret the Pact for itself, it has been argued that the Pact had no definite or positive practical meaning as to what wars were renounced, but rather had the practical effect of legalizing all wars. See, for example, E. M. Borchard, "The Multilateral Treaty for the Renunciation of War," 23 *A.J.I.L.* (1929), 116.

On the other hand, it has been claimed for the Pact: (1) that it recognized in each ratifying State the right to determine for itself when the Pact had been violated, and thus a right to discriminate against such violator as an aggressor; (2) that each ratifying State had thus a treaty right to deny to a violator the rights of a belligerent ("benefits of the Pact" as mentioned in the Preamble) and to co-operate in measures of discrimination against a violator—e.g., in League of Nations sanctions (see §§ 133-137)—without assuming more explicit obligations like those of the League of Nations Covenant; (3) that it established a legal basis upon which each ratifying State might refuse to recognize as valid in law (a) *de facto* situations brought about in violation of the Pact, such as those arising from military conquest, (b) treaties brought about by means which were in violation of the Pact. See, for example, Quincy Wright, "Meaning of the Pact of Paris," 27 *A.J.I.L.* (1933), 59, and "Budapest Articles of Interpretation," 38th *Report*, International Law Association (1934), 4-6. If such primarily logical inferences had been supported by general and agreed practice under the Pact, international law would have been revolutionized, in that force or war would have had no legal consequences as a means of changing the status of States. Such a revolution has not taken place, although the United States and other States ratifying the Pact refused to recognize the situation brought about by Japanese conquests in China, and in 1939 the

ARTICLE III

The present Treaty shall be ratified by the High Contracting Parties named in the Preamble in accordance with their respective constitutional requirements, and shall take effect as between them as soon as all their several instruments of ratification shall have been deposited at Washington.

This Treaty shall, when it has come into effect as prescribed in the preceding paragraph, remain open as long as may be necessary for adherence by all the other Powers of the world. Every instrument evidencing the adherence of a Power shall be deposited at Washington and the Treaty shall immediately upon such deposit become effective as between the Power thus adhering and the other Powers parties hereto. . . .

[Names of Plenipotentiaries, etc., are omitted.]

§ 114. THE HAGUE CONVENTION OF 1907

Convention (I) for the Pacific Settlement of International Disputes¹

The First and Second International Peace Conferences, 63d Congress, 2d Session, H. R. Document No. 1151, pp. 45-73.

[Translation. Names of signatory States and the preamble are omitted.]

PART I. *The Maintenance of General Peace*

ARTICLE I. With a view to obviating as far as possible recourse to force in the relations between States, the Contracting Powers agree to use their best efforts to ensure the pacific settlement of international differences.

United States declined to recognize any legal basis for the protectorate established over Bohemia and Moravia on the basis of an agreement secured by threat of force. In the latter case the position of the United States was not based in form upon the Pact. On several occasions the United States has consulted and co-operated with other States on the basis of the Pact, notably in connection with the Sino-Russian conflict of 1929, the Sino-Japanese conflict of 1931, and the Leticia conflict of 1933 between Colombia and Peru.

For references, see end of this chapter.—ED.

¹ Concluded, October 18, 1907; ratification advised by the Senate, April 2, 1908; ratified by the President, February 23, 1909; ratification deposited with the Netherlands Government, November 27, 1909; proclaimed, February 28, 1910. For ratifications and adhesions as of 1939, see Table, § 123, below.

The Resolution by the Senate advising and consenting to ratification of this Convention, April 2, 1908, read as follows: "*Resolved (two-thirds of the Senators present concurring therein)*, That the Senate advise and consent to the ratification of a convention signed by the delegates of the United States to the Second International Peace Conference, held at The Hague from June sixteenth to October eighteenth, nineteen hundred and seven, for the pacific settlement of international disputes, subject to the declaration made by the delegates of the United States before signing said convention, namely:

"Nothing contained in this convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign state; nor shall anything contained in the said convention be construed to imply a

PART II. *Good Offices and Mediation*

ARTICLE II. In case of serious disagreement or dispute, before an appeal to arms, the Contracting Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers.

ARTICLE III. Independently of this recourse, the Contracting Powers deem it expedient and desirable that one or more Powers, strangers to the dispute, should, on their own initiative and as far as circumstances may allow, offer their good offices or mediation to the States at variance.

Powers strangers to the dispute have the right to offer good offices or mediation even during the course of hostilities.

The exercise of this right can never be regarded by either of the parties in dispute as an unfriendly act.

ARTICLE IV. The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance.

ARTICLE V. The functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

ARTICLE VI. Good offices and mediation undertaken either at the request of the parties in dispute or on the initiative of Powers strangers to the dispute have exclusively the character of advice, and never have binding force.

ARTICLE VII. The acceptance of mediation cannot, unless there be an agreement to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war.

If it takes place after the commencement of hostilities, the military operations in progress are not interrupted in the absence of an agreement to the contrary.

ARTICLE VIII. The Contracting Powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form:—

relinquishment by the United States of its traditional attitude toward purely American questions.

"Resolved further, as a part of this act of ratification, That the United States approves this convention with the understanding that recourse to the permanent court for the settlement of differences can be had only by agreement thereto through general or special treaties of arbitration heretofore or hereafter concluded between the parties in dispute; and the United States now exercises the option continued in article fifty-three of said convention, to exclude the formulation of the 'compromis' by the permanent court, and hereby excludes from the competence of the permanent court the power to frame the 'compromis' required by general or special treaties of arbitration concluded or hereafter to be concluded by the United States, and further expressly declares that the 'compromis' required by any treaty of arbitration to which the United States may be a party shall be settled only by agreement between the contracting parties, unless such treaty shall expressly provide otherwise."—ED.

In case of a serious difference endangering peace, the States at variance choose respectively a Power, to which they intrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations.

For the period of this mandate, the term of which, unless otherwise stipulated, cannot exceed thirty days, the States in dispute cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers, which must use their best efforts to settle it.

In case of a definite rupture of pacific relations, these Powers are charged with the joint task of taking advantage of any opportunity to restore peace.

PART III. *International Commissions of Inquiry*

ARTICLE IX.—In disputes of an international nature involving neither honour nor vital interests, and arising from a difference of opinion on points of fact, the Contracting Powers deem it expedient and desirable that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an International Commission of Inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.

ARTICLE X. International Commissions of Inquiry are constituted by special agreement between the parties in dispute.

The Inquiry Convention defines the facts to be examined; it determines the mode and time in which the Commission is to be formed and the extent of the powers of the Commissioners.

It also determines, if there is need, where the Commission is to sit, and whether it may remove to another place, the language the Commission shall use and the languages the use of which shall be authorized before it, as well as the date on which each party must deposit its statement of facts, and, generally speaking, all the conditions upon which the parties have agreed.

If the parties consider it necessary to appoint Assessors, the Convention of Inquiry shall determine the mode of their selection and the extent of their powers.

ARTICLE XI. If the Inquiry Convention has not determined where the Commission is to sit, it will sit at The Hague.

The place of meeting, once fixed, cannot be altered by the Commission except with the assent of the parties

If the Inquiry Convention has not determined what languages are to be employed, the question shall be decided by the Commission.

ARTICLE XII. Unless an undertaking is made to the contrary, Commissions of Inquiry shall be formed in the manner determined by Articles XLV and LVII of the present Convention.

ARTICLE XIII. Should one of the Commissioners or one of the Assessors, should there be any, either die, or resign, or be unable for any reason whatever to discharge his functions, the same procedure is followed for filling the vacancy as was followed for appointing him.

[ARTICLES XIV-XXXII, dealing with procedure, are omitted.]

ARTICLE XXXIII. The Report is signed by all the members of the Commission.

If one of the members refuses to sign, the fact is mentioned; but the validity of the Report is not affected.

ARTICLE XXXIV. The Report of the Commission is read at a public sitting, the agents and counsel of the parties being present or duly summoned.

A copy of the Report is given to each party.

ARTICLE XXXV. The Report of the Commission is limited to a statement of facts, and has in no way the character of an Award. It leaves to the parties entire freedom as to the effect to be given to the statement.

ARTICLE XXXVI. Each party pays its own expenses and an equal share of the expenses incurred by the Commission.

PART IV. *International Arbitration*

Chapter I. *The System of Arbitration*

ARTICLE XXXVII. International arbitration has for its object the settlement of disputes between States by Judges of their own choice and on the basis of respect for law.

Recourse to arbitration implies an engagement to submit in good faith to the Award.

ARTICLE XXXVIII. In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Contracting Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle.

Consequently, it would be desirable that, in disputes about the above-mentioned questions, the Contracting Powers should, if the case arose, have recourse to arbitration, in so far as circumstances permit.

ARTICLE XXXIX. The Arbitration Convention is concluded for questions already existing or for questions which may arise eventually.

It may embrace any dispute or only disputes of a certain category.

ARTICLE XL. Independently of general or private Treaties expressly stipulating recourse to arbitration as obligatory on the Contracting Powers, the said Powers reserve to themselves the right of concluding new Agreements, general or particular, with a view to extending compulsory arbitration to all cases which they may consider it possible to submit to it.

Chapter II. *The Permanent Court of Arbitration*

ARTICLE XLI. With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Contracting Powers undertake to maintain the Permanent Court of Arbitration, as established by the First Peace Conference, accessible at all times, and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present Convention.

ARTICLE XLII. The Permanent Court is competent for all arbitration cases, unless the parties agree to institute a special Tribunal.

ARTICLE XLIII. The Permanent Court sits at The Hague.

An International Bureau serves as registry for the Court. It is the channel for communications relative to the meetings of the Court; it has charge of the archives and conducts all the administrative business.

The Contracting Powers undertake to communicate to the Bureau, as soon as possible, a certified copy of any conditions of arbitration arrived at between them and of any Award concerning them delivered by a special Tribunal.

They likewise undertake to communicate to the Bureau the laws, regulations, and documents eventually showing the execution of the Awards given by the Court.

ARTICLE XLIV. Each Contracting Power selects four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrator.

The persons thus selected are inscribed, as members of the Court, in a list which shall be notified to all the Contracting Powers by the Bureau.

Any alteration in the list of Arbitrators is brought by the Bureau to the knowledge of the Contracting Powers.

Two or more Powers may agree on the selection in common of one or more members.

The same person can be selected by different Powers. The members of the Court are appointed for a term of six years. These appointments are renewable.

Should a member of the Court die or resign, the same procedure is followed for filling the vacancy as was followed for appointing him. In this case the appointment is made for a fresh period of six years.

ARTICLE XLV. When the Contracting Powers wish to have recourse to the Permanent Court for the settlement of a difference which has arisen between them, the Arbitrators called upon to form the Tribunal with jurisdiction to decide this difference must be chosen from the general list of members of the Court.

Failing the direct agreement of the parties on the composition of the Arbitration Tribunal, the following course shall be pursued:—

Each party appoints two Arbitrators, of whom one only can be its national or chosen from among the persons selected by it as members of the Permanent Court. These Arbitrators together choose an Umpire.

If the votes are equally divided, the choice of the Umpire is intrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject each party selects a different Power, and the choice of the Umpire is made in concert by the powers thus selected.

If, within two months' time, these two Powers cannot come to an agreement, each of them presents two candidates taken from the list of members of the Permanent Court, exclusive of the members selected by the parties and not being nationals of either of them. Drawing lots determines which of the candidates thus presented shall be Umpire.

ARTICLE XLVI. The tribunal being thus composed, the parties notify to the Bureau their determination to have recourse to the Court, the text of their "Compromis,"² and the names of the arbitrators.

The Bureau communicates without delay to each Arbitrator the "Compromis," and the names of the other members of the Tribunal.

The Tribunal assembles at the date fixed by the parties. The Bureau makes the necessary arrangements for the meeting.

The members of the Tribunal, in the exercise of their duties and out of their own country, enjoy diplomatic privileges and immunities.

ARTICLE XLVII. The Bureau is authorized to place its offices and staff at the disposal of the Contracting Powers for the use of any special Board of Arbitration.

The jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to disputes between non-Contracting Powers or between Contracting Powers and non-Contracting Powers, if the parties are agreed on recourse to this Tribunal.

ARTICLE XLVIII. The Contracting Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them.

Consequently, they declare that the fact of reminding the parties at

² The preliminary agreement in an international arbitration defining the points at issue and arranging the procedure to be followed. See Article LII below.—Ed.

variance of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as friendly actions.

In case of dispute between two Powers, one of them can always address to the International Bureau a note containing a declaration that it would be ready to submit the dispute to arbitration.

The Bureau must at once inform the other Power of the declaration.

ARTICLE XLIX. The Permanent Administrative Council, composed of the Diplomatic Representatives of the Contracting Powers accredited to The Hague and of the Netherland Minister for Foreign Affairs, who will act as President, is charged with the direction and control of the International Bureau.

The Council settles its rules of procedure and all other necessary regulations.

It decides all questions of administration which may arise with regard to the operations of the Court.

It has entire control over the appointment, suspension, or dismissal of the officials and employés of the Bureau.

It fixes the payments and salaries, and controls the general expenditure.

At meetings duly summoned the presence of nine members is sufficient to render valid the discussions of the Council. The decisions are taken by a majority of votes.

The Council communicates to the Contracting Powers without delay the regulations adopted by it. It furnishes them with an annual Report on the labours of the Court, the working of the administration, and the expenditure. The Report likewise contains a résumé of what is important in the documents communicated to the Bureau by the Powers in virtue of Article XLIII, paragraphs 3 and 4.

ARTICLE L. The expenses of the Bureau shall be borne by the Contracting Powers in the proportion fixed for the International Bureau of the Universal Postal Union.

The expenses to be charged to the adhering Powers shall be reckoned from the date on which their adhesion comes into force.

Chapter III. *Arbitration Procedure*

ARTICLE LI. With a view to encouraging the development of arbitration, the Contracting Powers have agreed on the following rules, which are applicable to arbitration procedure, unless other rules have been agreed on by the parties.

ARTICLE LII. The Powers which have recourse to arbitration sign a "Compromis," in which the subject of the dispute is clearly defined, the time allowed for appointing Arbitrators, the form, order, and time in which

the communication referred to in Article LXIII must be made, and the amount of the sum which each party must deposit in advance to defray the expenses.

The "Compromis" likewise defines, if there is occasion, the manner of appointing Arbitrators, any special powers which may eventually belong to the Tribunal, where it shall meet, the language it shall use, and the languages the employment of which shall be authorized before it, and, generally speaking, all the conditions on which the parties are agreed.

ARTICLE LIII. The Permanent Court is competent to settle the "Compromis," if the parties are agreed to have recourse to it for the purpose.

It is similarly competent, even if the request is only made by one of the parties, when all attempts to reach an understanding through the diplomatic channel have failed, in the case of:

1. A dispute covered by a general Treaty of Arbitration concluded or renewed after the present Convention has come into force, and providing for a "Compromis" in all disputes and not either explicitly or implicitly excluding the settlement of the "Compromis" from the competence of the Court. Recourse cannot, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of disputes which can be submitted to compulsory arbitration, unless the Treaty of Arbitration confers upon the Arbitration Tribunal the power of deciding this preliminary question.

2. A dispute arising from contract debts claimed from one Power by another Power as due to its nationals, and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the "Compromis" should be settled in some other way.

ARTICLE LIV. In the cases contemplated in the preceding Article, the "Compromis" shall be settled by a Commission consisting of five members selected in the manner arranged for in Article XLV, paragraphs 3 to 6.

The fifth member is President of the Commission *ex officio*.

[Articles LV-LXXXVIII are omitted.]

ARTICLE LXXIX. The Award must give the reasons on which it is based. It contains the names of the Arbitrators; it is signed by the President and Registrar or by the Secretary acting as Registrar.

ARTICLE LXXX. The Award is read out in public sitting, the agents and counsel of the parties being present or duly summoned to attend.

ARTICLE LXXXI. The Award, duly pronounced and notified to the agents of the parties, settles the dispute definitively and without appeal.

ARTICLE LXXXII. Any dispute arising between the parties as to the interpretation and execution of the Award shall, in the absence of an

Agreement to the contrary, be submitted to the Tribunal which pronounced it.

ARTICLE LXXXIII. The parties can reserve in the "Compromis" the right to demand the revision of the Award.

In this case and unless there be an Agreement to the contrary, the demand must be addressed to the Tribunal which pronounced the Award. It can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence upon the Award and which was unknown to the Tribunal and to the party which demanded the revision at the time the discussion was closed.

Proceedings for revision can only be instituted by a decision of the Tribunal expressly recording the existence of the new fact, recognizing in it the character described in the preceding paragraph, and declaring the demand admissible on this ground.

The "Compromis" fixes the period within which the demand for revision must be made.

ARTICLE LXXXIV. The Award is not binding except on the parties in dispute.

When it concerns the interpretation of a Convention to which Powers other than those in dispute are parties, they shall inform all the Signatory Powers in good time. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the Award is equally binding on them.

ARTICLE LXXXV. Each party pays its own expenses and an equal share of the expenses of the Tribunal.

[Chapter IV, *Arbitration by Summary Procedure*, is omitted.]

PART V. *Final Provisions*

ARTICLE XCI. The present Convention, duly ratified, shall replace, as between the Contracting Powers, the Convention for the Pacific Settlement of International Disputes of the 29th July, 1899.

[Articles XCII-XCVII, dealing with ratification, denunciation, and so on, and the signatures of the Plenipotentiaries, are omitted.]

§ 115. COVENANT OF THE LEAGUE OF NATIONS

The Covenant of the League of Nations is printed here in its entirety as the most generally adopted instrument for the pacific settlement of all kinds of international disputes. Articles 10-17 embody the obligations of pacific settlement assumed by League Members.

The Covenant of the League of Nations

PART I OF THE TREATY OF PEACE SIGNED AT VERSAILLES, JUNE 28, 1919¹

Text as published by the Information Section, League of Nations
Secretariat (1938).

THE HIGH CONTRACTING PARTIES,

In order to promote international co-operation and to achieve international peace and security

by the acceptance of obligations not to resort to war,

by the prescription of open, just and honourable relations between nations,

by the firm establishment of the understandings of international law as the actual rule of conduct among Governments,

and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another,

Agree to this Covenant of the League of Nations.

ARTICLE I

1. The original Members of the League of Nations shall be those of the Signatories which are named in the Annex to this Covenant and also such of those other States named in the Annex as shall accede without reservation to this Covenant. Such accession shall be effected by a Declaration deposited with the Secretariat within two months of the coming into force of the Covenant. Notice thereof shall be sent to all other Members of the League.

2. Any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments.

3. Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal.

ARTICLE 2

The action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a Council, with a permanent Secretariat.

¹ In force January 10, 1920. For accessions, admissions, and withdrawals as of 1939, see Table, § 123, below.—Ed.

ARTICLE 3

1. The Assembly shall consist of Representatives of the Members of the League.
2. The Assembly shall meet at stated intervals and from time to time as occasion may require at the Seat of the League or at such other place as may be decided upon.
3. The Assembly may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world.
4. At meetings of the Assembly, each Member of the League shall have one vote, and may have not more than three Representatives.

ARTICLE 4

1. The Council shall consist of Representatives of the Principal Allied and Associated Powers, together with Representatives of four other Members of the League. These four Members of the League shall be selected by the Assembly from time to time in its discretion. Until the appointment of the Representatives of the four Members of the League first selected by the Assembly, Representatives of Belgium, Brazil, Spain and Greece shall be Members of the Council.

2. With the approval of the majority of the Assembly, the Council may name additional Members of the League, whose Representatives shall always be Members of the Council; the Council with like approval may increase the number of Members of the League to be selected by the Assembly for representation on the Council.

2bis. The Assembly shall fix by a two-thirds majority the rules dealing with the election of the non-permanent Members of the Council, and particularly such regulations as relate to their term of office and the conditions of re-eligibility.²

3. The Council shall meet from time to time as occasion may require, and at least once a year, at the Seat of the League, or at such other place as may be decided upon.

4. The Council may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world.

² The words in italics are an amendment which came into force July 29, 1926. The election of Germany in 1926 restored the number of permanent members to five as originally contemplated (the United States never having taken its seat), and the resignation of Japan from the League was counterbalanced by the entrance of Russia. But the resignation of Germany reduced the permanent membership to the following States: United Kingdom, France, Italy, and Russia. Italy subsequently announced its withdrawal from the League. The number of nonpermanent members was increased to six in 1922, nine in 1926, ten in 1933, and eleven in 1936. The nine memberships provided for in 1933 are divided into three groups, each of which is elected for three years and is not eligible to re-election unless the Assembly so declares; but the Assembly may declare not more than three re-eligible. Re-eligibility carries no guarantee of re-election, but the tendency is to create a group of semi-permanent seats through re-eligibility and re-election.—Ed.

5. Any Member of the League not represented on the Council shall be invited to send a Representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member of the League.

6. At meetings of the Council, each Member of the League represented on the Council shall have one vote, and may have not more than one Representative.

ARTICLE 5

1. Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council, shall require the agreement of all the Members of the League represented at the meeting.

2. All matters of procedure at meetings of the Assembly or of the Council, including the appointment of Committees to investigate particular matters, shall be regulated by the Assembly or by the Council and may be decided by a majority of the Members of the League represented at the meeting.

3. The first meeting of the Assembly and the first meeting of the Council shall be summoned by the President of the United States of America.

ARTICLE 6

1. The permanent Secretariat shall be established at the Seat of the League. The Secretariat shall comprise a Secretary-General and such secretaries and staff as may be required.

2. The first Secretary-General shall be the person named in the Annex; thereafter the Secretary-General shall be appointed by the Council with the approval of the majority of the Assembly.

3. The secretaries and staff of the Secretariat shall be appointed by the Secretary-General with the approval of the Council.

4. The Secretary-General shall act in that capacity at all meetings of the Assembly and of the Council.

5. *The expenses of the League shall be borne by the Members of the League in the proportion decided by the Assembly.*³

ARTICLE 7

1. The Seat of the League is established at Geneva.

2. The Council may at any time decide that the Seat of the League shall be established elsewhere.

³ The words printed in italics were proposed as amendments by vote of the Assembly in 1921 and came into force on August 13, 1924. For other amendments voted by the Assembly in 1921 but not in force, see Hudson, *International Legislation*, I, 21 ff.—ED.

3. All positions under or in connection with the League, including the Secretariat, shall be open equally to men and women.

4. Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities.

5. The buildings and other property occupied by the League or its officials or by Representatives attending its meetings shall be inviolable.

ARTICLE 8

1. The Members of the League recognize that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations.

2. The Council, taking account of the geographical situation and circumstances of each State, shall formulate plans for such reduction for the consideration and action of the several Governments.

3. Such plans shall be subject to reconsideration and revision at least every ten years.

4. After these plans have been adopted by the several Governments, the limits of armaments therein fixed shall not be exceeded without the concurrence of the Council.

5. The Members of the League agree that the manufacture by private enterprise of munitions and implements of war is open to grave objections. The Council shall advise how the evil effects attendant upon such manufacture can be prevented, due regard being had to the necessities of those Members of the League which are not able to manufacture the munitions and implements of war necessary for their safety.

6. The Members of the League undertake to interchange full and frank information as to the scale of their armaments, their military, naval and air programmes and the condition of such of their industries as are adaptable to warlike purposes.

ARTICLE 9

A permanent Commission shall be constituted to advise the Council on the execution of the provisions of Articles 1 and 8 and on military, naval and air questions generally.

ARTICLE 10

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled.

ARTICLE II

1. Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise, the Secretary-General shall, on the request of any Member of the League, forthwith summon a meeting of the Council.

2. It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.

ARTICLE 12⁴

1. The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration *or judicial settlement* or to enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators *or the judicial decision* or the report by the Council.

2. In any case under this Article the award of the arbitrators *or the judicial decision* shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute.

ARTICLE 13⁵

1. The Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration *or judicial settlement*, and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration *or judicial settlement*.

2. Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration *or judicial settlement*.

3. *For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, estab-*

⁴The words printed in italics were added as amendments by vote of the Assembly in 1921 and came into force on September 26, 1924.—Ed.

⁵See Article 12, note.—Ed.

*lished in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them.*⁶

4. The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto.

ARTICLE 14

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

ARTICLE 15⁷

1. If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or *judicial settlement* in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary-General, who will make all necessary arrangements for a full investigation and consideration thereof.

2. For this purpose, the parties to the dispute will communicate to the Secretary-General, as promptly as possible, statements of their case with all the relevant facts and papers, and the Council may forthwith direct the publication thereof.

3. The Council shall endeavour to effect a settlement of the dispute, and if such efforts are successful, a statement shall be made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the Council may deem appropriate.

4. If the dispute is not thus settled, the Council either unanimously or by a majority vote shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto.

5. Any Member of the League represented on the Council may make

⁶ This paragraph replaces the following paragraph of the original text: "For the consideration of any such dispute the court of arbitration to which the case is referred shall be the court agreed on by the parties to the dispute or stipulated in any convention existing between them."—Ed.

⁷ See Article 12, note.—Ed.

public a statement of the facts of the dispute and of its conclusions regarding the same.

6. If a report by the Council is unanimously agreed to by the Members thereof other than the Representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report.

7. If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.

8. If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.

9. The Council may in any case under this Article refer the dispute to the Assembly. The dispute shall be so referred at the request of either party to the dispute provided that such request be made within fourteen days after the submission of the dispute to the Council.

10. In any case referred to the Assembly, all the provisions of this Article and of Article 12 relating to the action and powers of the Council shall apply to the action and powers of the Assembly, provided that a report made by the Assembly, if concurred in by the Representatives of those Members of the League represented on the Council and of a majority of the other Members of the League, exclusive in each case of the Representatives of the parties to the dispute, shall have the same force as a report by the Council concurred in by all the members thereof other than the Representatives of one or more of the parties to the dispute.

ARTICLE 16⁸

1. Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

⁸ For materials relating to sanctions in the Italo-Ethiopian controversy, see §§ 133-137, below.—Ed.

2. It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.

3. The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League.

4. Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.

ARTICLE 17

1. In the event of a dispute between a Member of the League and a State which is not a Member of the League, or between States not Members of the League, the State or States not Members of the League shall be invited to accept the obligations of membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just. If such invitation is accepted, the provisions of Articles 12 to 16 inclusive shall be applied with such modifications as may be deemed necessary by the Council.

2. Upon such invitation being given, the Council shall immediately institute an enquiry into the circumstances of the dispute and recommend such action as may seem best and most effectual in the circumstances.

3. If a State so invited shall refuse to accept the obligations of membership in the League for the purposes of such dispute, and shall resort to war against a Member of the League, the provisions of Article 16 shall be applicable as against the State taking such action.

4. If both parties to the dispute when so invited refuse to accept the obligations of membership in the League for the purposes of such dispute, the Council may take such measures and make such recommendations as will prevent hostilities and will result in the settlement of the dispute.

ARTICLE 18

Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered.

ARTICLE 19

The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world.

ARTICLE 20

1. The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.

2. In case any Member of the League shall, before becoming a Member of the League, have undertaken any obligations inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations.

ARTICLE 21

Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace.

ARTICLE 22⁹

1. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

2. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who, by reason of their resources, their experience or their geographical position, can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

3. The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

4. Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations

⁹ See § 19, above.—ED.

can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.¹⁰

5. Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.¹¹

6. There are territories, such as South West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.¹²

7. In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

8. The degree of authority, control or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

9. A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.

ARTICLE 23

Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:

¹⁰ Mandates under this paragraph are known as "A" Mandates. They include (1) The Lebanon and (2) Syria, under French Mandate; (3) Palestine (see § 19b above) and (4) Trans-Jordan, under United Kingdom Mandate. Iraq, originally an "A" Mandate under the United Kingdom, became a Member of the League, October 3, 1932.—Ed.

¹¹ Mandates under this paragraph are known as "B" Mandates. They include (1) Togoland, (2) Cameroons and (3) Tanganyika, under United Kingdom Mandate; (4) Togoland and (5) Cameroons, under French Mandate; (6) Ruanda-Urundi, under Belgian Mandate.—Ed.

¹² Mandates under this paragraph are known as "C" Mandates. They include (1) South West Africa, under Mandate of the South African Union; (2) the Marianas and Caroline Islands, Islands of Yap and Marshall Islands, under Mandate of Japan; (3) New Guinea, New Ireland, New Britain, and Solomon Islands, under Mandate of Australia; (4) Nauru, under Mandate of British Empire exercised through Australia; (5) Western Samoa, under Mandate of New Zealand. Japan ceased to be a member of the League, March, 1935, but retains her Mandates.—Ed.

(a) will endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organisations;

(b) undertake to secure just treatment of the native inhabitants of territories under their control;

(c) will entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children, and the traffic in opium and other dangerous drugs;

(d) will entrust the League with the general supervision of the trade in arms and ammunition with the countries in which the control of this traffic is necessary in the common interest;

(e) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. In this connection, the special necessities of the regions devastated during the war of 1914-1918 shall be borne in mind;

(f) will endeavour to take steps in matters of international concern for the prevention and control of disease.

ARTICLE 24

1. There shall be placed under the direction of the League the international bureaux already established by general treaties if the parties to such treaties consent. All such international bureaux and all commissions for the regulation of matters of international interest hereafter constituted shall be placed under the direction of the League.

2. In all matters of international interest which are regulated by general conventions but which are not placed under the control of international bureaux or commissions, the Secretariat of the League shall, subject to the consent of the Council and if desired by the parties, collect and distribute all relevant information and shall render any other assistance which may be necessary or desirable.

3. The Council may include as part of the expenses of the Secretariat the expenses of any bureau or commission which is placed under the direction of the League.

ARTICLE 25

The Members of the League agree to encourage and promote the establishment and co-operation of duly authorised voluntary national Red Cross organisations having as purposes the improvement of health, the prevention of disease and the mitigation of suffering throughout the world.

ARTICLE 26¹³

1. Amendments to this Covenant will take effect when ratified by the Members of the League whose Representatives compose the Council and by a majority of the Members of the League whose Representatives compose the Assembly.

2. No such amendments shall bind any Member of the League which signifies its dissent therefrom, but in that case it shall cease to be a Member of the League.

[*Annex* omitted; printed in § 12 above.]

§ 116. STATUTE, PERMANENT COURT OF INTERNATIONAL JUSTICE ("WORLD COURT")

The Statute of the Permanent Court of International Justice is printed here as the most generally adopted instrument for the settlement of international disputes which have a legal rather than a political character.

Article 14 of the Covenant of the League of Nations provided that the Council of the League should submit to the League Members plans for a Permanent Court of International Justice which should determine international disputes submitted to it and give advisory opinions upon questions submitted by the Council or the Assembly. Accordingly, a Statute was drafted by a Committee of Jurists, amended by the Assembly, and submitted to the States for ratification in a "Protocol of Signature" of December 16, 1920. The Statute (or constitution) of the Court submitted in this Protocol came into force August 21, 1921, when the Protocol had been ratified by a majority of the Members of the League. Experience with the Statute indicated that certain amendments were desirable, and in 1929 the Assembly adopted a Draft Protocol embodying amendments drawn up by a Conference called for the purpose, and proposed these amendments to the States. The "Protocol of Revision" provided that it should come into force September 1, 1930, "provided that the Council of the League of Nations has satisfied itself that those Members of the League of Nations and States mentioned in the Annex to the Covenant which have ratified the Protocol of December 16th, 1920, and whose ratification of the present Protocol has not been received by that date, have no objection to the coming into force of the amendments to the Statute" annexed to the Protocol. However, the Protocol did not come into force until February 1, 1936. The Protocol of Revision provides that "the new provisions shall form part of the Statute adopted in 1920. . . ." and that any subsequent acceptance of the Statute of the Court "shall constitute an acceptance of the Statute as amended."

The principal changes made by the amendments are (1) provision for Advisory Opinions, omitted in the 1920 Statute; (2) abolition of Deputy-Judges;

¹³ Of seventeen protocols of Amendment, only five have come into force. For texts and comment see Hudson, *International Legislation*, I, 19-42; 33 *A.J.I.L.* (1939), 138-146; and "Amendment of the Covenant of the League of Nations," 38 *Harvard Law Review* (1925) 903-942. For amendments proposed in 1938 to loosen the formal ties between the Covenant and the Peace Treaties, see the former article by Hudson, and D. P. Myers, "The League of Nations Covenant—1939 Model," 33 *American Political Science Review* (1939), 193 ff.—Ed.

(3) provisions required by Membership in the Court of States not Members of the League; (4) provisions for labor cases.

It was hoped that the United States would adhere to the Court Protocols, but the United States Senate never gave its consent to their ratification.

It should be borne in mind that what is printed below is the Statute of the Court as amended in 1936, and the Statute merely. The two Protocols, which embody the international obligations of the States, are not printed. The text is reproduced from *Statute and Rules of Court and other Constitutional Documents, Rules or Regulations*, Publications, Permanent Court of International Justice, Series D, No. 1 (Third edition—March, 1936), p. 12. All new articles and those in which changes have been made are indicated by asterisks. To facilitate comparison with the text of 1920, all new text has been italicized by the editor; and, where expedient, the 1920 text is printed in footnotes.

Statute of the Court

Provided for by Article 14 of the Covenant of the League of Nations
As Amended in Accordance with the Protocol of September 14, 1929.¹

ARTICLE 1. A Permanent Court of International Justice is hereby established, in accordance with Article 14 of the Covenant of the League of Nations. This Court shall be in addition to the Court of Arbitration organized by the Conventions of The Hague of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement.

CHAPTER I

Organization of the Court

ARTICLE 2. The Permanent Court of International Justice shall be composed of a body of independent judges, elected regardless of their nationality from amongst persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

ARTICLE 3.* The Court shall consist of fifteen members.²

ARTICLE 4.* The members of the Court shall be elected by the Assembly and by the Council from a list of persons nominated by the national groups in the Court of Arbitration, in accordance with the following provisions.

In the case of Members of the League of Nations not represented in the Permanent Court of Arbitration, the lists of candidates shall be drawn up by national groups appointed for this purpose by their governments

¹ In force February 1, 1936. For ratifications and adhesions as of 1939, see Table, § 123, below.—Ed.

² Art. 3, 1920 text: "The Court shall consist of fifteen members: eleven judges and four deputy-judges. The number of judges and deputy-judges may hereafter be increased by the Assembly, upon the proposal of the Council of the League of Nations, to a total of fifteen judges and six deputy-judges."—Ed.

under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.³

The conditions under which a State which has accepted the Statute of the Court but is not a Member of the League of Nations, may participate in electing the members of the Court shall, in the absence of a special agreement, be laid down by the Assembly on the proposal of the Council.

ARTICLE 5. At least three months before the date of the election, the Secretary-General of the League of Nations shall address a written request to the members of the Court of Arbitration belonging to the States mentioned in the Annex to the Covenant or to the States which join the League subsequently, and to the persons appointed under paragraph 2 of Article 4, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case must the number of candidates nominated be more than double the number of seats to be filled.

ARTICLE 6. Before making these nominations, each national group is recommended to consult its Highest Court of Justice, its Legal Faculties and Schools of Law, and its National Academies and national sections of International Academies devoted to the study of Law.

ARTICLE 7. The Secretary-General of the League of Nations shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible for appointment.

The Secretary-General shall submit this list to the Assembly and to the Council.

ARTICLE 8.* The Assembly and the Council shall proceed independently of one another to elect the members of the Court.⁴

ARTICLE 9. At every election, the electors shall bear in mind that not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilization and the principal legal systems of the world.

ARTICLE 10. Those candidates who obtain an absolute majority of votes in the Assembly and in the Council shall be considered as elected.

In the event of more than one national of the same Member of the League being elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected.

³ See § 114, above.—Ed.

⁴ Art. 8, 1920 text: "The Assembly and the Council shall proceed independently of one another to elect, firstly the judges, then the deputy-judges."—Ed.

ARTICLE 11. If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

ARTICLE 12. If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the Assembly and three by the Council, may be formed, at any time, at the request of either the Assembly or the Council, for the purpose of choosing one name for each seat still vacant, to submit to the Assembly and the Council for their respective acceptance.

If the Conference is unanimously agreed upon any person who fulfils the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Articles 4 and 5.

If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been appointed shall, within a period to be fixed by the Council, proceed to fill the vacant seats by selection from amongst those candidates who have obtained votes either in the Assembly or in the Council.

In the event of an equality of votes amongst the judges, the eldest judge shall have a casting vote.

ARTICLE 13.* The members of the Court shall be elected for nine years. They may be re-elected.

They shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

In the case of the resignation of a member of the Court, the resignation will be addressed to the President of the Court for transmission to the Secretary-General of the League of Nations.

This last notification makes the place vacant.

ARTICLE 14.* Vacancies which may occur shall be filled by the same method as that laid down for the first election, *subject to the following provision: the Secretary-General of the League of Nations shall, within one month of the occurrence of the vacancy, proceed to issue the invitations provided for in Article 5, and the date of the election shall be fixed by the Council at its next session.*

ARTICLE 15.* A member of the Court elected to replace a member whose period of appointment has not expired, will hold the appointment for the remainder of his predecessor's term.⁵

⁵ Art. 14, 1920 text: "Vacancies which may occur shall be filled by the same method as that laid down for the first election. A member of the Court elected to replace a member whose period of appointment had not expired will hold the appointment for the remainder of his predecessor's term." Art. 15, 1920 text: "Deputy-judges shall be called upon to sit in the order laid down in a list.

"This list shall be prepared by the Court and shall have regard firstly to priority of election and secondly to age."—Ed.

ARTICLE 16.* The members of the Court may not exercise any political or administrative function, *nor engage in any other occupation of a professional nature.*

Any doubt on this point is settled by the decision of the Court.⁶

ARTICLE 17.* No member of the Court may act as agent, counsel or advocate in any case.

No member may participate in the decision of any case in which he has previously taken an active part as agent, counsel or advocate for one of the contesting parties, or as a member of a national or international Court, or of a commission of enquiry, or in any other capacity.

Any doubt on this point is settled by the decision of the Court.⁷

ARTICLE 18. A member of the Court cannot be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions.

Formal notification thereof shall be made to the Secretary-General of the League of Nations, by the Registrar.

This notification makes the place vacant.

ARTICLE 19. The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

ARTICLE 20. Every member of the Court shall, before taking up his duties, make a solemn declaration in open Court that he will exercise his powers impartially and conscientiously.

ARTICLE 21. The Court shall elect its President and Vice-President for three years; they may be re-elected.

It shall appoint its Registrar.

The duties of Registrar of the Court shall not be deemed incompatible with those of Secretary-General of the Permanent Court of Arbitration.

ARTICLE 22. The seat of the Court shall be established at The Hague.

The President and Registrar shall reside at the seat of the Court.

ARTICLE 23.* *The Court shall remain permanently in session except during the judicial vacations, the dates and duration of which shall be fixed by the Court.*

Members of the Court whose homes are situated at more than five days' normal journey from The Hague shall be entitled, apart from the judicial vacations, to six months' leave every three years, not including the time spent in travelling.

⁶ Art. 16, 1920 text: "The ordinary members of the Court may not exercise any political or administrative function. This provision does not apply to the deputy-judges except when performing their duties on the court. Any doubt on this point is settled by the decision of the Court."—Ed.

⁷ Art. 17, 1920 text: "No member of the Court may act as agent, counsel or advocate in any case of an international nature. This provision only applies to the deputy-judges as regards cases in which they are called upon to exercise their functions on the Court." The second and third paragraphs remain unchanged in the amended text.—Ed.

*Members of the Court shall be bound, unless they are on regular leave or prevented from attending by illness or other serious reason duly explained to the President, to hold themselves permanently at the disposal of the Court.*⁸

ARTICLE 24. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.

If the President considers that for some special reason one of the members of the Court should not sit on a particular case, he shall give him notice accordingly.

If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

ARTICLE 25.* The full Court shall sit except when it is expressly provided otherwise.

Subject to the condition that the number of judges available to constitute the Court is not thereby reduced below eleven, the Rules of Court may provide for allowing one or more judges, according to circumstances and in rotation, to be dispensed from sitting.

*Provided always that a quorum of nine judges shall suffice to constitute the Court.*⁹

ARTICLE 26.* Labour cases, particularly cases referred to in Part XIII (Labour) of the Treaty of Versailles and the corresponding portions of the other treaties of peace, shall be heard and determined by the Court under the following conditions:

The Court will appoint every three years a special Chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this Chamber. *In the absence of any such demand, the full Court will sit. In both cases, the judges will be assisted by four technical assessors sitting with them, but without the right to vote, and chosen with a view to ensuring a just representation of the competing interests.*

The technical assessors shall be chosen for each particular case in accord-

⁸ Art. 23, 1920 text: "A session of the Court shall be held every year.

"Unless otherwise provided by Rules of Court, this session shall begin on the 15th of June, and shall continue for so long as may be deemed necessary to finish the cases on the list.

"The President may summon an extraordinary session of the Court whenever necessary."—Ed.

⁹ Art. 25, 1920 text: "The full Court shall sit except when it is expressly provided otherwise.

"If eleven judges cannot be present, the number shall be made up by calling on deputy-judges to sit. If, however, eleven judges are not available, a quorum of nine judges shall suffice to constitute the Court."—Ed.

ance with rules of procedure under Article 30 from a list of "Assessors for Labour Cases" composed of two persons nominated by each Member of the League of Nations and an equivalent number nominated by the Governing Body of the Labour Office. The Governing Body will nominate, as to one-half, representatives of the workers, and, as to one-half, representatives of employers from the list referred to in Article 412 of the Treaty of Versailles and the corresponding articles of the other treaties of peace.

Recourse may always be had to the summary procedure provided for in Article 29, in the cases referred to in the first paragraph of the present Article, if the parties so request.

In Labour cases, the International Labour Office shall be at liberty to furnish the Court with all relevant information, and for this purpose the Director of that Office shall receive copies of all the written proceedings.¹⁰

ARTICLE 27.* Cases relating to transit and communications, particularly cases referred to in Part XII (Ports, Waterways and Railways) of the Treaty of Versailles and the corresponding portions of the other treaties of peace, shall be heard and determined by the Court under the following conditions:

The Court will appoint every three years a special Chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this Chamber. *In the absence of any such demand, the full Court will sit.* When desired by the parties or decided by the Court, the judges will be assisted by four technical assessors sitting with them, but without the right to vote.

¹⁰ Art. 26, 1920 text: "Labour cases, particularly cases referred to in Part XIII (Labour) of the Treaty of Versailles and the corresponding portions of the other Treaties of Peace, shall be heard and determined by the Court under the following conditions:

"The Court will appoint every three years a special Chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this Chamber. In the absence of any such demand, the Court will sit with the number of judges provided for in Article 25. On all occasions the judges will be assisted by four technical assessors sitting with them, but without the right to vote, and chosen with a view to ensuring a just representation of the competing interests.

"If there is a national of one only of the parties sitting as a judge in the Chamber referred to in the preceding paragraph, the President will invite one of the other judges to retire in favour of a judge chosen by the other party in accordance with Article 31.

"The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of 'Assessors for Labour Cases' composed of two persons nominated by each Member of the League of Nations and an equivalent number nominated by the Governing Body of the Labour Office. The Governing Body will nominate, as to one-half, representatives of the workers, and as to one-half, representatives of employers from the list referred to in Article 412 of the Treaty of Versailles and the corresponding articles of the other Treaties of Peace.

"In Labour cases, the International Labour Office shall be at liberty to furnish the Court with all relevant information, and for this purpose the Director of that Office shall receive copies of all the written proceedings."—Ed.

The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of "Assessors for Transit and Communications Cases" composed of two persons nominated by each Member of the League of Nations.

*Recourse may always be had to the summary procedure provided for in Article 29, in the cases referred to in the first paragraph of the present Article, if the parties so request.*¹¹

ARTICLE 28. The special chambers provided for in Articles 26 and 27 may, with the consent of the parties to the dispute, sit elsewhere than at The Hague.

ARTICLE 29.* With a view to the speedy despatch of business, the Court shall form annually a Chamber composed of *five*¹² judges who, at the request of the contesting parties, may hear and determine cases by summary procedure. *In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit.*

ARTICLE 30. The Court shall frame rules for regulating its procedure. In particular, it shall lay down rules for summary procedure.

ARTICLE 31.* Judges of the nationality of each of the contesting parties shall retain their right to sit in the case before the Court.

If the Court includes upon the Bench a judge of the nationality of one of the parties, the other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

If the Court includes upon the Bench no judge of the nationality of the contesting parties, each of these parties may proceed to select a judge as provided in the preceding paragraph.

The present provision shall apply to the case of Articles 26, 27 and 29. In such cases, the President shall request one or, if necessary, two of the members of the Court forming the Chamber to give place to the members

¹¹ Art. 27, 1920 text: "Cases relating to transit and communications, particularly cases referred to in Part XII (Ports, Waterways and Railways) of the Treaty of Versailles and the corresponding portions of the other Treaties of Peace, shall be heard and determined by the Court under the following conditions:

"The Court will appoint every three years a special Chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this Chamber. In the absence of any such demand, the Court will sit with the number of judges provided for in Article 25. When desired by the parties or decided by the Court, the judges will be assisted by four technical assessors sitting with them, but without the right to vote.

"If there is a national of one only of the parties sitting as a judge in the Chamber referred to in the preceding paragraph, the President will invite one of the other judges to retire in favour of a judge chosen by the other party in accordance with Article 31.

"The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of 'Assessors for Transit and Communications Cases' composed of two persons nominated by each Member of the League of Nations."—Ed.

¹² Formerly three.—Ed.

of the Court of the nationality of the parties concerned, and, failing such or if they are unable to be present, to the judges specially appointed by the parties.

Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point is settled by the decision of the Court.

Judges selected as laid down in paragraphs 2, 3 and 4 of this Article shall fulfil the conditions required by Articles 2, 17 (*paragraph 2*), 20 and 24 of this Statute. They shall take part in the decision on *terms of complete equality* with their colleagues.¹³

ARTICLE 32.* *The members of the Court shall receive an annual salary. The President shall receive a special annual allowance.*

The Vice-President shall receive a special allowance for every day on which he acts as President.

The Judges appointed under Article 31, other than members of the Court, shall receive an indemnity for each day on which they sit.

These salaries, allowances and indemnities shall be fixed by the Assembly of the League of Nations on the proposal of the Council. They may not be decreased during the term of office.

The salary of the Registrar shall be fixed by the Assembly on the proposal of the Court.

Regulations made by the Assembly shall fix the conditions under which retiring pensions may be given to members of the Court and to the Registrar, and the conditions under which members of the Court and the Registrar shall have their travelling expenses refunded.

*The above salaries, indemnities and allowances shall be free of all taxation.*¹⁴

¹³ Art. 31, 1920 text: "Judges of the nationality of each contesting party shall retain their right to sit in the case before the Court. If the Court includes upon the Bench a judge of the nationality of one of the parties only, the other party may select from among the deputy-judges a judge of its nationality, if there be one. If there should not be one, the party may choose a judge, preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

"If the Court includes upon the Bench no judge of the nationality of the contesting parties, each of these may proceed to select or choose a judge as provided in the preceding paragraph.

"Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point is settled by the decision of the Court.

"Judges selected or chosen as laid down in paragraphs 2, 3 and 4 of this Article shall fulfil the conditions required by Articles 2, 16, 17, 20, and 24 of this Statute. They shall take part in the decision on an equal footing with their colleagues."—Ed.

¹⁴ Art. 32, 1920 text: "The judges shall receive an annual indemnity to be determined by the Assembly of the League of Nations upon the proposal of the Council. This indemnity must not be decreased during the period of a judge's appointment.

"The President shall receive a special grant for his period of office, to be fixed in the same way.

ARTICLE 33. The expenses of the Court shall be borne by the League of Nations, in such a manner as shall be decided by the Assembly upon the proposal of the Council.

CHAPTER II

Competence of the Court

ARTICLE 34. Only States or Members of the League of Nations can be parties in cases before the Court.

ARTICLE 35.* The Court shall be open to the Members of the League and also to States mentioned in the Annex to the Covenant.

The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Council, but in no case shall such provisions place the parties in a position of inequality before the Court.

When a State which is not a Member of the League of Nations is a party to a dispute, the Court will fix the amount which that party is to contribute towards the expenses of the Court. *This provision shall not apply if such State is bearing a share of the expenses of the Court.*

ARTICLE 36. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force.

The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.

"The Vice-President, judges and deputy-judges, shall receive a grant for the actual performance of their duties, to be fixed in the same way.

"Travelling expenses incurred in the performance of their duties shall be refunded to judges and deputy-judges who do not reside at the seat of the Court.

"Grants due to judges selected or chosen as provided in Article 31 shall be determined in the same way.

"The salary of the Registrar shall be decided by the Council upon the proposal of the Court.

"The Assembly of the League of Nations shall lay down, on the proposal of the Council, a special regulation fixing the conditions under which retiring pensions may be given to the personnel of the Court."—ED.

The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

ARTICLE 37. When a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court will be such tribunal.

ARTICLE 38. The Court shall apply:

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
2. International custom, as evidence of a general practice accepted as law;
3. The general principles of law recognized by civilized nations;
4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

CHAPTER III

Procedure

ARTICLE 39.* The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment will be delivered in French. If the parties agree that the case shall be conducted in English, the judgment will be delivered in English.

In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court will be given in French and English. In this case the Court will at the same time determine which of the two texts shall be considered as authoritative.

The Court may, at the request of *any party*,¹⁵ authorize a language other than French or English to be used.

ARTICLE 40.* Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the contesting parties must be indicated.

The Registrar shall forthwith communicate the application to all concerned.

He shall also notify the Members of the League of Nations through

¹⁵ 1920 text: "of the parties."—Ed.

the Secretary-General, *and also any States entitled to appear before the Court.*

ARTICLE 41. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to reserve the respective rights of either party.

Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council.

ARTICLE 42. The parties shall be represented by agents.

They may have the assistance of counsel or advocates before the Court.

ARTICLE 43. The procedure shall consist of two parts: written and oral.

The written proceedings shall consist of the communication to the judges and to the parties of Cases, Counter-Cases and, if necessary, Replies; also all papers and documents in support.

These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

A certified copy of every document produced by one party shall be communicated to the other party.

The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates.

ARTICLE 44. For the service of all notices upon persons other than the agents, counsel and advocates, the Court shall apply direct to the government of the State upon whose territory the notice has to be served.

The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

ARTICLE 45.* The hearing shall be under the control of the President or, *if he is unable to preside*, of the Vice-President; *if neither is able to preside*, the senior judge shall preside.¹⁶

ARTICLE 46. The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.

ARTICLE 47. Minutes shall be made at each hearing, and signed by the Registrar and the President.

These minutes shall be the only authentic record.

ARTICLE 48. The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

ARTICLE 49. The Court may, even before the hearing begins, call upon the agents to produce any document, or to supply any explanation. Formal note shall be taken of any refusal.

¹⁶ Art. 45, 1920 text: "The hearing shall be under the control of the President or, in his absence, of the Vice-President; if both are absent, the senior judge shall preside."—ED.

ARTICLE 50. The Court may, at any time, entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.

ARTICLE 51. During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

ARTICLE 52. After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

ARTICLE 53. Whenever one of the parties shall not appear before the Court, or shall fail to defend his case, the other party may call upon the Court to decide in favour of his claim.

The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

ARTICLE 54. When, subject to the control of the Court, the agents, advocates and counsel have completed their presentation of the case, the President shall declare the hearing closed.

The Court shall withdraw to consider the judgment.

The deliberations of the Court shall take place in private and remain secret.

ARTICLE 55. All questions shall be decided by a majority of the judges present at the hearing.

In the event of an equality of votes, the President or his deputy shall have a casting vote.

ARTICLE 56. The judgment shall state the reasons on which it is based.

It shall contain the names of the judges who have taken part in the decision.

ARTICLE 57. If the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion.

ARTICLE 58. The judgment shall be signed by the President and by the Registrar. It shall be read in open Court, due notice having been given to the agents.

ARTICLE 59. The decision of the Court has no binding force except between the parties and in respect of that particular case.

ARTICLE 60. The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

ARTICLE 61. An application for revision of a judgment can be made only when it is based upon the discovery of some fact of such a nature as to be

a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

The proceedings for revision will be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

The application for revision must be made at latest within six months of the discovery of the new fact.

No application for revision may be made after the lapse of ten years from the date of the sentence.

ARTICLE 62. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene as a third party.

It will be for the Court to decide upon this request.

ARTICLE 63. Whenever the construction of a convention to which States other than those concerned in the case are parties is in question the Registrar shall notify all such States forthwith.

Every State so notified has the right to intervene in the proceedings: but if it uses this right, the construction given by the judgment will be equally binding upon it.

ARTICLE 64. Unless otherwise decided by the Court, each party shall bear its own costs.

CHAPTER IV Advisory Opinions ¹⁷

ARTICLE 65.* *Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request, signed either by the President of the Assembly or the President of the Council of the League of Nations, or by the Secretary-General of the League under instructions from the Assembly or the Council.*

The request shall contain an exact statement of the question upon which an opinion is required, and shall be accompanied by all documents likely to throw light upon the question.

ARTICLE 66.* 1. *The Registrar shall forthwith give notice of the request for an advisory opinion to the Members of the League of Nations, through the Secretary-General of the League, and to any States entitled to appear before the Court.*

¹⁷ Articles 65-68 are new.—Ed.

The Registrar shall also, by means of a special and direct communication, notify any Member of the League or State admitted to appear before the Court or international organization considered by the Court (or, should it not be sitting, by the President) as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

Should any Member or State referred to in the first paragraph have failed to receive the communication specified above, such Member or State may express a desire to submit a written statement, or to be heard; and the Court will decide.

2. Members, States, and organizations having presented written or oral statements or both shall be admitted to comment on the statements made by other Members, States, or organizations in the form, to the extent and within the time-limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to Members, States, and organizations having submitted similar statements.

ARTICLE 67. The Court shall deliver its advisory opinions in open Court, notice having been given to the Secretary-General of the League of Nations and to the representatives of Members of the League, of States and of international organizations immediately concerned.*

ARTICLE 68. In the exercise of its advisory functions, the Court shall further be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.*

§ 117. ASPIRATION AT ITS ZENITH: THE "GENEVA PROTOCOL"

The Protocol for the Pacific Settlement of International Disputes was prepared by the Fifth Assembly of the League of Nations in 1924. It never went into effect: Article 21 provided that it should not unless a plan of disarmament called for in Article 17 should be accepted, and Great Britain in 1925 found herself unable to accept compulsory arbitration and compulsory sanctions. It is presented here as the most thoroughgoing and complete plan for securing the pacific settlement of international disputes that has ever come reasonably near acceptance by the community of nations. As Professor Eagleton remarks: "While the Protocol is open to criticism in some parts, it marks nevertheless the greatest advance yet made by the community of nations toward the elimination of war. It states more effectively the principle of outlawing war, and provides machinery and sanctions to make the principle operate with more vitality than does the Pact of Paris. Its principles have never been surrendered at Geneva; there are many who believe that any final settlement of the problem of war will involve a return to these principles."—*International Government*, p. 538.

Protocol for the Pacific Settlement of International Disputes

ADOPTED BY THE ASSEMBLY OF THE LEAGUE OF NATIONS AND OPENED FOR

SIGNATURE AT GENEVA, OCTOBER 2, 1924

Text from *Arbitration, Security and Reduction of Armaments—Documents and Proceedings of the Fifth Assembly*, publication of the Information Section, League of Nations Secretariat, Geneva, October 31, 1924, pp. 8-21.

Animated by the firm desire to ensure the maintenance of general peace and the security of nations whose existence, independence or territories may be threatened;

Recognising the solidarity of the members of the international community;

Asserting that a war of aggression constitutes a violation of this solidarity and an international crime;

Desirous of facilitating the complete application of the system provided in the Covenant of the League of Nations for the pacific settlement of disputes between States and of ensuring the repression of international crimes; and

For the purpose of realising, as contemplated by Article 8 of the Covenant, the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations;

The undersigned, duly authorised to that effect, agree as follows:

ARTICLE 1. The signatory States undertake to make every effort in their power to secure the introduction into the Covenant of amendments on the lines of the provisions contained in the following articles.

They agree that, as between themselves, these provisions shall be binding as from the coming into force of the present Protocol and that, so far as they are concerned, the Assembly and the Council of the League of Nations shall thenceforth have power to exercise all the rights and perform all the duties conferred upon them by the Protocol.

ARTICLE 2. The signatory States agree in no case to resort to war either with one another or against a State which, if the occasion arises, accepts all the obligations hereinafter set out, except in case of resistance to acts of aggression or when acting in agreement with the Council or the Assembly of the League of Nations in accordance with the provisions of the Covenant and of the present Protocol.

ARTICLE 3. The signatory States undertake to recognise as compulsory, *ipso facto* and without special agreement, the jurisdiction of the Permanent Court of International Justice in the cases covered by paragraph 2 of Article 36 of the Statute of the Court, but without prejudice to the right of any State, when acceding to the special protocol provided for in the said article

and opened for signature on December 16th, 1920, to make reservations compatible with the said clause.

Accession to this special protocol, opened for signature on December 16th, 1920, must be given within the month following the coming into force of the present Protocol.

States which accede to the present Protocol after its coming into force must carry out the above obligation within the month following their accession.

ARTICLE 4. With a view to render more complete the provisions of paragraphs 4, 5, 6, and 7 of Article 15 of the Covenant, the signatory States agree to comply with the following procedure:

1. If the dispute submitted to the Council is not settled by it as provided in paragraph 3 of the said Article 15, the Council shall endeavour to persuade the parties to submit the dispute to judicial settlement or arbitration.
2. (a) If the parties cannot agree to do so, there shall, at the request of at least one of the parties, be constituted a Committee of Arbitrators. The Committee shall so far as possible be constituted by agreement between the parties.
(b) If within the period fixed by the Council the parties have failed to agree, in whole or in part, upon the number, the names and the powers of the arbitrators and upon the procedure, the Council shall settle the points remaining in suspense. It shall with the utmost possible despatch select in consultation with the parties the arbitrators and their President from among persons who by their nationality, their personal character and their experience, appear to it to furnish the highest guarantees of competence and impartiality.
(c) After the claims of the parties have been formulated, the Committee of Arbitrators, on the request of any party, shall through the medium of the Council request an advisory opinion upon any points of law in dispute from the Permanent Court of International Justice, which in such case shall meet with the utmost possible despatch.
3. If none of the parties asks for arbitration, the Council shall again take the dispute under consideration. If the Council reaches a report which is unanimously agreed to by the members thereof other than the representatives of any of the parties to the dispute, the signatory States agree to comply with the recommendations therein.
4. If the Council fails to reach a report which is concurred in by all its members, other than the representatives of any of the parties to the dispute, it shall submit the dispute to arbitration. It shall itself determine the composition, the powers and the procedure of the Committee of

- Arbitrators and, in the choice of the arbitrators, shall bear in mind the guarantees of competence and impartiality referred to in paragraph 2 (b) above.
5. In no case may a solution upon which there has already been a unanimous recommendation of the Council accepted by one of the parties concerned be again called in question.
 6. The signatory States undertake that they will carry out in full good faith any judicial sentence or arbitral award that may be rendered and that they will comply, as provided in paragraph 3 above, with the solutions recommended by the Council. In the event of a State failing to carry out the above undertakings, the Council shall exert all its influence to secure compliance therewith. If it fails therein, it shall propose what steps should be taken to give effect thereto, in accordance with the provision contained at the end of Article 13 of the Covenant. Should a State in disregard of the above undertakings resort to war, the sanctions provided for by Article 16 of the Covenant, interpreted in the manner indicated in the present Protocol, shall immediately become applicable to it.
 7. The provisions of the present article do not apply to the settlement of disputes which arise as the result of measures of war taken by one or more signatory States in agreement with the Council or the Assembly.

ARTICLE 5. The provisions of paragraph 8 of Article 15 of the Covenant shall continue to apply in proceedings before the Council.

If in the course of an arbitration, such as is contemplated in Article 4 above, one of the parties claims that the dispute, or part thereof, arises out of a matter which by international law is solely within the domestic jurisdiction of that party, the arbitrators shall on this point take the advice of the Permanent Court of International Justice through the medium of the Council. The opinion of the Court shall be binding upon the arbitrators, who, if the opinion is affirmative, shall confine themselves to so declaring in their award.

If the question is held by the Court or by the Council to be a matter solely within the domestic jurisdiction of the State, this decision shall not prevent consideration of the situation by the Council or by the Assembly under Article 11 of the Covenant.

ARTICLE 6. If in accordance with paragraph 9 of Article 15 of the Covenant a dispute is referred to the Assembly, that body shall have for the settlement of the dispute all the powers conferred upon the Council as to endeavouring to reconcile the parties in the manner laid down in paragraphs 1, 2 and 3 of Article 15 of the Covenant and in paragraph 1 of Article 4 above.

Should the Assembly fail to achieve an amicable settlement:

If one of the parties asks for arbitration, the Council shall proceed to constitute the Committee of Arbitrators in the manner provided in sub-paragraphs (a), (b) and (c) of paragraph 2 of Article 4 above.

If no party asks for arbitration, the Assembly shall again take the dispute under consideration and shall have in this connection the same powers as the Council. Recommendations embodied in a report of the Assembly, provided that it secures the measure of support stipulated at the end of paragraph 10 of Article 15 of the Covenant, shall have the same value and effect, as regards all matters dealt with in the present Protocol, as recommendations embodied in a report of the Council adopted as provided in paragraph 3 of Article 4 above.

If the necessary majority cannot be obtained, the dispute shall be submitted to arbitration and the Council shall determine the composition, the powers and the procedure of the Committee of Arbitrators as laid down in paragraph 4 of Article 4 above.

ARTICLE 7. In the event of a dispute arising between two or more signatory States, these States agree that they will not, either before the dispute is submitted to proceedings for pacific settlement or during such proceedings, make any increase of their armaments or effectives which might modify the position established by the Conference for the Reduction of Armaments provided for by Article 17 of the present Protocol, nor will they take any measure of military, naval, air, industrial or economic mobilisation, nor, in general, any action of a nature likely to extend the dispute or render it more acute.

It shall be the duty of the Council, in accordance with the provisions of Article 11 of the Covenant, to take under consideration any complaint as to infraction of the above undertakings which is made to it by one or more of the States parties to the dispute. Should the Council be of opinion that the complaint requires investigation, it shall, if it deems it expedient, arrange for enquiries and investigations in one or more of the countries concerned. Such enquiries and investigations shall be carried out with the utmost possible despatch and the signatory States undertake to afford every facility for carrying them out.

The sole object of measures taken by the Council as above provided is to facilitate the pacific settlement of disputes and they shall in no way prejudice the actual settlement.

If the result of such enquiries and investigations is to establish an infraction of the provisions of the first paragraph of the present article, it shall be the duty of the Council to summon the State or States guilty of the infraction to put an end thereto. Should the State or States in question fail to comply with such summons, the Council shall declare them to be guilty of a

violation of the Covenant or of the present Protocol, and shall decide upon the measures to be taken with a view to end as soon as possible a situation of a nature to threaten the peace of the world.

For the purposes of the present article decisions of the Council may be taken by a two-thirds majority.

ARTICLE 8. The signatory States undertake to abstain from any act which might constitute a threat of aggression against another State.

If one of the signatory States is of opinion that another State is making preparations for war, it shall have the right to bring the matter to the notice of the Council.

The Council, if it ascertains that the facts are as alleged, shall proceed as provided in paragraphs 2, 4 and 5 of Article 7.

ARTICLE 9. The existence of demilitarised zones being calculated to prevent aggression and to facilitate a definite finding of the nature provided for in Article 10 below, the establishment of such zones between States mutually consenting thereto is recommended as a means of avoiding violations of the present Protocol.

The demilitarised zones already existing under the terms of certain treaties or conventions, or which may be established in future between States mutually consenting thereto, may, at the request and at the expense of one or more of the conterminous States, be placed under a temporary or permanent system of supervision to be organised by the Council.

ARTICLE 10. Every State which resorts to war in violation of the undertakings contained in the Covenant or in the present Protocol is an aggressor. Violation of the rules laid down for a demilitarised zone shall be held equivalent to resort to war.

In the event of hostilities having broken out, any State shall be presumed to be an aggressor, unless a decision of the Council, which must be taken unanimously, shall otherwise declare:

- (1) if it has refused to submit the dispute to the procedure of pacific settlement provided by Articles 13 and 15 of the Covenant as amplified by the present Protocol, or to comply with a judicial sentence or arbitral award or with a unanimous recommendation of the Council, or has disregarded a unanimous report of the Council, a judicial sentence or an arbitral award recognising that the dispute between it and the other belligerent State arises out of a matter which by international law is solely within the domestic jurisdiction of the latter State; nevertheless, in the last case the State shall only be presumed to be an aggressor if it has not previously submitted the question to the Council or the Assembly, in accordance with Article 11 of the Covenant;

- (2) if it has violated provisional measures enjoined by the Council for the period while the proceedings are in progress as contemplated by Article 7 of the present Protocol.

Apart from the cases dealt with in paragraphs 1 and 2 of the present article, if the Council does not at once succeed in determining the aggressor, it shall be bound to enjoin upon the belligerents an armistice, and shall fix the terms, acting, if need be, by a two-thirds majority, and shall supervise its execution.

Any belligerent which has refused to accept the armistice or has violated its terms shall be deemed an aggressor.

The Council shall call upon the signatory States to apply forthwith against the aggressor the sanctions provided by Article 11 of the present Protocol, and any signatory State thus called upon shall thereupon be entitled to exercise the rights of a belligerent.

ARTICLE 11. As soon as the Council has called upon the signatory States to apply sanctions, as provided in the last paragraph of Article 10 of the present Protocol, the obligations of the said States, in regard to the sanctions of all kinds mentioned in paragraphs 1 and 2 of Article 16 of the Covenant will immediately become operative in order that such sanctions may forthwith be employed against the aggressor.

These obligations shall be interpreted as obliging each of the signatory States to co-operate loyally and effectively in support of the Covenant of the League of Nations, and in resistance to any act of aggression, in the degree which its geographical position and its particular situation as regards armaments allow.

In accordance with paragraph 3 of Article 16 of the Covenant the signatory States give a joint and several undertaking to come to the assistance of the State attacked or threatened, and to give each other mutual support by means of facilities and reciprocal exchanges as regards the provision of raw materials and supplies of every kind, openings of credits, transport and transit, and for this purpose to take all measures in their power to preserve the safety of communications by land and by sea of the attacked or threatened State.

If both parties to the dispute are aggressors within the meaning of Article 10, the economic and financial sanctions shall be applied to both of them.

ARTICLE 12. In view of the complexity of the conditions in which the Council may be called upon to exercise the functions mentioned in Article 11 of the present Protocol concerning economic and financial sanctions, and in order to determine more exactly the guarantees afforded by the present Protocol to the signatory States, the Council shall forthwith invite the eco-

nomie and financial organisations of the League of Nations to consider and report as to the nature of the steps to be taken to give effect to the financial and economic sanctions and measures of co-operation contemplated in Article 16 of the Covenant and in Article 11 of this Protocol.

When in possession of this information, the Council shall draw up through its competent organs:

1. Plans of action for the application of the economic and financial sanctions against an aggressor State;
2. Plans of economic and financial co-operation between a State attacked and the different States assisting it;

and shall communicate these plans to the Members of the League and to the other signatory States.

ARTICLE 13. In view of the contingent military, naval and air sanctions provided for by Article 16 of the Covenant and by Article 11 of the present Protocol, the Council shall be entitled to receive undertakings from States determining in advance the military, naval and air forces which they would be able to bring into action immediately to ensure the fulfilment of the obligations in regard to sanctions which result from the Covenant and the present Protocol.

Furthermore, as soon as the Council has called upon the signatory States to apply sanctions, as provided in the last paragraph of Article 10 above, the said States may, in accordance with any agreements which they may previously have concluded, bring to the assistance of a particular State, which is the victim of aggression, their military, naval and air forces.

The agreements mentioned in the preceding paragraph shall be registered and published by the Secretariat of the League of Nations. They shall remain open to all States Members of the League which may desire to accede thereto.

ARTICLE 14. The Council shall alone be competent to declare that the application of sanctions shall cease and normal conditions be reestablished.

ARTICLE 15. In conformity with the spirit of the present Protocol, the signatory States agree that the whole cost of any military, naval or air operations undertaken for the repression of an aggression under the terms of the Protocol, and reparation for all losses suffered by individuals, whether civilians or combatants, and for all material damage caused by the operations of both sides, shall be borne by the aggressor State up to the extreme limit of its capacity.

Nevertheless, in view of Article 10 of the Covenant, neither the territorial integrity nor the political independence of the aggressor State shall in any case be affected as the result of the application of the sanctions mentioned in the present Protocol.

ARTICLE 16. The signatory States agree that in the event of a dispute between one or more of them and one or more States which have not signed the present Protocol and are not Members of the League of Nations, such non-Member States shall be invited, on the conditions contemplated in Article 17 of the Covenant, to submit, for the purpose of a pacific settlement, to the obligations accepted by the States signatories of the present Protocol.

If the State so invited, having refused to accept the said conditions and obligations, resorts to war against a signatory State, the provisions of Article 16 of the Covenant, as defined by the present Protocol, shall be applicable against it.

ARTICLE 17. The signatory States undertake to participate in an International Conference for the Reduction of Armaments which shall meet at Geneva on Monday, June 15th, 1925. All other States, whether Members of the League or not, shall be invited to this Conference.

In preparation for the convening of the Conference, the Council shall draw up with due regard to the undertakings contained in Articles 11 and 13 of the present Protocol, a general programme for the reduction and limitation of armaments, which shall be laid before the Conference and which shall be communicated to the Governments at the earliest possible date, and at the latest three months before the Conference meets.

If by May 1st, 1925, ratifications have not been deposited by at least a majority of the permanent Members of the Council and ten other Members of the League, the Secretary-General of the League shall immediately consult the Council as to whether he shall cancel the invitations or merely adjourn the Conference to a subsequent date to be fixed by the Council so as to permit the necessary number of ratifications to be obtained.

ARTICLE 18. Wherever mention is made in Article 10, or in any other provision of the present Protocol, of a decision of the Council, this shall be understood in the sense of Article 15 of the Covenant, namely, that the votes of the representatives of the parties to the dispute shall not be counted when reckoning unanimity or the necessary majority.

ARTICLE 19. Except as expressly provided by its terms, the present Protocol shall not affect in any way the rights and obligations of Members of the League as determined by the Covenant.

ARTICLE 20. Any dispute as to the interpretation of the present Protocol shall be submitted to the Permanent Court of International Justice.

ARTICLE 21. The present Protocol, of which the French and English texts are both authentic, shall be ratified.

The deposit of ratifications shall be made at the Secretariat of the League of Nations as soon as possible.

States of which the seat of government is outside Europe will be entitled

merely to inform the Secretariat of the League of Nations that their ratification has been given; in that case, they must transmit the instrument of ratification as soon as possible.

So soon as the majority of the permanent Members of the Council and ten other Members of the League have deposited or have effected their ratifications, a *procès-verbal* to that effect shall be drawn up by the Secretariat.

After the said *procès-verbal* has been drawn up, the Protocol shall come into force as soon as the plan for the reduction of armaments has been adopted by the Conference provided for in Article 17.

If within such period after the adoption of the plan for the reduction of armaments as shall be fixed by the said Conference, the plan has not been carried out, the Council shall make a declaration to that effect; this declaration shall render the present Protocol null and void.

The grounds on which the Council may declare that the plan drawn up by the International Conference for the Reduction of Armaments has not been carried out, and that in consequence the present Protocol has been rendered null and void, shall be laid down by the Conference itself.

A signatory State which, after the expiration of the period fixed by the Conference, fails to comply with the plan adopted by the Conference, shall not be admitted to benefit by the provisions of the present Protocol.

In faith whereof the Undersigned, duly authorised for this purpose, have signed the present Protocol.

DONE at Geneva, on the second day of October, nineteen hundred and twenty-four, in a single copy, which will be kept in the archives of the Secretariat of the League and registered by it on the date of its coming into force.

§ 118. THE GENERAL ACT OF ARBITRATION

NOTE BY THE EDITOR

The Geneva Protocol (above, § 117) never came into force, but efforts continued through the League to extend the area of pacific settlement as widely as possible. A principal result was the formulation of a *General Act of Arbitration for the Pacific Settlement of International Disputes*, adopted by the Assembly and opened to accession by all States on September 26, 1928. Limitations of space prevent the printing of the General Act here, but its main lines may be indicated. (1) All disputes not settled by diplomacy and not reserved under Article 39 are to be submitted to permanent or special conciliation commissions; (2) "All disputes with regard to which the parties are in conflict as to their respective rights" shall (unless

reserved under Article 39) be submitted either to the Permanent Court of International Justice or to an arbitration tribunal; (3) Disputes submitted to conciliation, and not of the type indicated in (2), upon failure of the parties to agree within one month after the report of the conciliation commission, must be submitted to an arbitral tribunal. The General Act provides for the establishment of the tribunal, failing other agreement by the parties; (4) Under Article 39, reservations may be made excluding the following from the operation of the Act: "2. . . (a) Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said Party may have a dispute; (b) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States; (c) Disputes concerning particular cases or clearly specified subject-matters, such as territorial status, or disputes falling within clearly defined categories." For acceding States, see § 123.¹

§ 119. A CONCILIATION OBLIGATION OF THE UNITED STATES: "KELLOGG" CONCILIATION TREATY

The documents in §§ 119 and 121 are bilateral treaties which together illustrate the recent policy of the United States with respect to negotiation of concrete obligations of pacific settlement. This policy was begun in a treaty signed with France on February 6, 1928. This treaty combined arbitration and conciliation provisions in the same instrument; but subsequently conciliation and arbitration engagements were entered into contemporaneously but in separate instruments, as was the case with the Polish treaties in this and the following documents. The present extent of these and other engagements of the United States for pacific settlement may be seen in the Table printed as § 123 below.

Treaty of Conciliation, United States and Poland

SIGNED AUGUST 16, 1928 ^{1a}

United States Treaty Series, No. 806.

[The preamble, names of plenipotentiaries, and so on, are omitted.]

ARTICLE I. Any disputes arising between the Government of the United States of America and the Government of Poland, of whatever nature they may be, shall, when ordinary diplomatic proceedings have failed and the High Contracting Parties do not have recourse to adjudication by a competent tribunal, be submitted for investigation and report to a permanent International Commission constituted in the manner prescribed in the next

¹ The text of the *General Act* may be found in *League of Nations Treaty Series*, No. 2123; Hudson, *International Legislation*, IV, 2529; or 29 *A.J.I.L.* (Supp., October, 1931), 204.

^{1a} Ratification advised by the Senate December 20, 1928; ratified by the President, January 4, 1929; ratified by Poland, December 23, 1929; ratifications exchanged at Warsaw, January 4, 1930; proclaimed January 6, 1930.—Ed.

succeeding Article; and they agree not to declare war or begin hostilities during such investigation and before the report is submitted.

ARTICLE II. The International Commission shall be composed of five members, to be appointed as follows: one member shall be chosen from each country, by the Government thereof; one member shall be chosen by each Government from some third country; the fifth member shall be chosen by common agreement between the two Governments, it being understood that he shall not be a citizen of either country.

The expenses of the Commission shall be paid by the two Governments in equal proportions.

The International Commission shall be appointed within six months after the exchange of ratifications of this treaty; and vacancies shall be filled according to the manner of the original appointment.

ARTICLE III. In case the High Contracting Parties shall have failed to adjust a dispute by diplomatic methods, and they do not have recourse to adjudication by a competent tribunal, they shall at once refer it to the International Commission for investigation and report. The International Commission may, however, spontaneously by unanimous agreement offer its services to that effect, and in such case it shall notify both Governments and request their cooperation in the investigation.

The High Contracting Parties agree to furnish the Permanent International Commission with all means and facilities required for its investigation and report.

The report of the Commission shall be completed within one year after the date on which it shall declare its investigation to have begun, unless the High Contracting Parties shall limit or extend the time by mutual agreement.

The report shall be prepared in triplicate; one copy shall be presented to each Government, and the third retained by the Commission for its files.

The High Contracting Parties reserve the right to act independently on the subject matter of the dispute after the report of the Commission shall have been submitted.

[Article IV omitted.]

§ 120. UNITED STATES CONCILIATION TREATIES

NOTE BY THE EDITOR

In referring to the treaties of which the documents here printed (§§ 119 and 121) are typical, an official *List of Treaties in Force* states: "The general arbitration and conciliation treaties signed in 1928 and 1929 are sometimes referred to as the Kellogg treaties: the older group of general arbitration

treaties, particularly those of 1908-1909, as the Root treaties. The treaties looking to the advancement of general peace are sometimes referred to as the Bryan treaties. *The Bryan treaties and the Kellogg conciliation treaties are similar in substance and largely similar in detail.*¹ Consequently, in analyzing the table printed below as § 123, a "Bryan treaty" obligation with a particular State may be usually considered as the equivalent of a "Kellogg conciliation treaty" obligation; hence it seems unnecessary to print an example of a Bryan treaty here.

Similar also to the "Kellogg conciliation" treaties is the Convention of February 7, 1923, between the United States and the Central American Republics for the Establishment of International Commissions of Inquiry (*United States Treaty Series*, No. 717) and the "Gondra Treaty" of May 3, 1923, between the United States and other American Republics (*United States Treaty Series*, No. 752). But the later *Convention of Inter-American Conciliation*, signed January 5, 1929 (*United States Treaty Series*, No. 780) goes further than mere investigation and report, with an accompanying "cooling off" period, and authorizes the Commissions of Inquiry established under the 1923 Treaty to act as true commissions of conciliation, attempting actively "to effect a settlement between the Parties." They "shall propose [in certain contingencies] to the Parties the bases of a settlement for the equitable solution of the controversy" (Article 6). These proposals, of course, do not have the force of an arbitral award and are not binding on the Parties (Article 9). This procedure is a genuine procedure of conciliation, unlike what is called conciliation in the "Kellogg conciliation" treaties. (See § 112 above, and "Commissions of Enquiry" in § 114 above.) The *Protocol of Inter-American Conciliation* of December 26, 1933 (*United States Treaty Series*, No. 887) recognizes the change in the character of the Commissions of 1923, by naming them "Permanent Diplomatic Commissions of Investigation and Conciliation" (Article 3).

The *Anti-War Treaty of Non-Aggression and Conciliation*, signed at Rio de Janeiro, October 10, 1933 (*United States Treaty Series*, No. 906) implements, as among the contracting American republics, the principles of the Kellogg Pact by providing a procedure for the settlement of all disputes, either under existing treaties or by a "conciliation" procedure like that of the Bryan treaties or the "Kellogg conciliation" treaties. In Article I the Parties declare that they "condemn wars of aggression in their mutual relations or in those with other states, and that the settlement of disputes or controversies of any kind that may arise among them shall be effected only by the pacific means which have the sanction of international law." To this reiteration of the principles of the Kellogg Pact,

¹ The italics are the editor's. *List of Treaties, etc., of the United States in Force* December 31, 1932; *Supplement to Treaty Information Bulletin* No. 39, December, 1932, p. 5.

Article II adds a declaration of the Hoover-Stimson "nonrecognition" doctrine (see § 26 above): ". . . as between the high contracting parties, territorial questions must not be settled by violence, and . . . they will not recognize any territorial arrangement which is not obtained by pacific means, nor the validity of the occupation or acquisition of territories that may be brought about by force of arms." Under Article III: "In case of non-compliance, by any state engaged in a dispute, with the obligations contained in the foregoing articles, the contracting states undertake to make every effort for the maintenance of peace. To that end they will adopt in their character as neutrals a common and solidary attitude; they will exercise the political, juridical, or economic means authorized by international law; they will bring the influence of public opinion to bear, but will in no case resort to intervention either diplomatic or armed; subject to the attitude that may be incumbent upon them by virtue of other collective treaties to which such states are signatories." Article IV obligates the signatories "to submit to the conciliation procedure established by this treaty, the disputes specially mentioned and any others that may arise in their reciprocal relations, without further limitations than those enumerated in the following article, in all controversies which it has not been possible to settle by diplomatic means within a reasonable period of time." The reservations in Article V are: (a) differences already provided for in existing special treaties; (b) disputes which the parties prefer to settle by negotiation or special arbitration; (c) disputes exclusively within the domestic jurisdiction; but where the dispute concerns manifest denial or delay of justice, the conciliation procedure "shall be initiated within a year at the latest"; (d) "matters which affect constitutional precepts of the parties . . ." Articles VI to IX provide for the establishment of Conciliation Commissions. Article X declares: "It is the duty of the commission to secure the conciliatory settlement of the disputes submitted to its consideration. After an impartial study of the questions in dispute, it shall set forth in a report the outcome of its work and shall propose to the parties bases of settlement by means of a just and equitable solution. The report of the commission shall in no case have the character of a final decision or an arbitral award either with respect to the exposition or the interpretation of the facts, or with regard to the considerations or conclusions of law." The report must be made within a year, but the parties do not regain their freedom of action until six months after the report. During the whole period from the initiation of the procedure, the parties "must abstain from any measure prejudicial to the execution of the agreement that may be proposed by the commission and, in general, from any act capable of aggravating or prolonging the controversy" (Article XIII).

§ 121. AN ARBITRATION OBLIGATION OF THE UNITED STATES: "KELLOGG" ARBITRATION TREATY

Treaty of Arbitration, United States and Poland

SIGNED AUGUST 16, 1928¹

United States Treaty Series, No. 805.

[The preamble, names of plenipotentiaries, and so on, are omitted.—Ed.]

ARTICLE I. All differences relating to international matters in which the High Contracting Parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, which it has not been possible to adjust by diplomacy, which have not been adjusted as a result of reference to an appropriate commission of conciliation, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity, shall be submitted to the Permanent Court of Arbitration established at The Hague by the Convention of October 18, 1907, or to some other competent tribunal, as shall be decided in each case by special treaty, which special treaty shall provide for the organization of such tribunal if necessary, define its powers, state the question or questions at issue, and settle the terms of reference.

The special treaty in each case shall be made on the part of the United States of America by the President of the United States of America by and with the advice and consent of the Senate thereof, and on the part of Poland by the President of the Republic of Poland in accordance with Polish constitutional law.

ARTICLE II. The provisions of this treaty shall not be invoked in respect of any dispute the subject matter of which

(a) is within the domestic jurisdiction of either of the High Contracting Parties,

(b) involves the interests of third Parties,

(c) depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine,

(d) depends upon or involves the observance of the obligations of Poland in accordance with the Covenant of the League of Nations.

[Article III omitted.]

¹ Ratification advised by the Senate, December 18 (Legislative Day, December 17), 1928; ratified by the President, January 4, 1929; ratified by Poland, December 23, 1929; ratifications exchanged at Warsaw, January 4, 1930; proclaimed January 6, 1930.—Ed.

§ 122. UNITED STATES ARBITRATION TREATIES—OTHER OBLIGATIONS OF PACIFIC SETTLEMENT

NOTE BY THE EDITOR

Just as the Bryan treaties and the "Kellogg conciliation" treaties are similar in substance, the "Kellogg arbitration" treaties fill substantially the same role as the earlier Root treaties. Both types deal with what are called "justiciable" or "legal" disputes, as distinguished from "political" disputes. The Root treaties provided for the arbitration of "differences which may arise of a legal nature or relating to the interpretation of treaties." The Kellogg arbitration treaties have a different formula, but the words "differences . . . which are justiciable in their nature by reason of being susceptible of decision by the application of principles of law or equity" still describe the same class of "legal" disputes. Again, the Root treaties excepted from their operation disputes affecting "the vital interests, the independence, or the honor" of the contracting States, as well as disputes concerning the interests of third parties. In the Kellogg arbitration treaties, (1) the "third parties" exception remains; (2) "vital interests" become the Monroe Doctrine and the League Covenant respectively; (3) "independence" becomes "domestic jurisdiction"; (4) "honor," while it does not reappear, seems to be sufficiently protected in the interstices. Both the Root and Kellogg arbitration treaties provided for reference to the Permanent Court of Arbitration at The Hague (though the Kellogg treaties admitted also other special tribunals), and both required the submission of each particular dispute by a treaty (*compromis*) requiring the advice and consent of the Senate.

It does not seem too much to say, therefore, that wherever a Root treaty is in existence with another State, the United States has assumed towards it obligations substantially equivalent to those undertaken towards States with which the United States has Kellogg arbitration treaties; and this fact should be kept in mind while analyzing the table printed as § 123 below. The *General Treaty of Inter-American Arbitration*, signed at Washington, January 5, 1929 (*United States Treaty Series*, No. 886), embodies obligations applying to the same "justiciable" type of disputes. The Parties agree in Article 1 to "submit to arbitration all differences of an international character which have arisen or may arise between them by virtue of a claim of right made by one against the other under treaty or otherwise, which it has not been possible to adjust by diplomacy and which are juridical in their nature by reason of being susceptible of decision by the application of principles of law." Questions of a juridical character are defined in the same terms as in Article 36 of the Statute of the Permanent Court of International Justice (see § 116). Article 2 excepts controversies "(a) . . . within the

domestic jurisdiction of any of the parties to the dispute and . . . not controlled by international law"; and "(b) those which affect the interest or refer to the action of a state not a party to this treaty."

The United States has recently entered into two other types of obligations of pacific settlement worthy of mention. The *Inter-American Treaty on Good Offices and Mediation*, signed December 23, 1936 (*United States Treaty Series*, No. 925), provides, when disputes cannot be settled by diplomatic means, for the permissive "recourse to the good offices or mediation of an eminent citizen" of one of the contracting States. "The mediator shall determine a period of time, not to exceed six nor be less than three months for the parties to arrive at some peaceful settlement. Should this period expire before the parties have reached some solution, the controversy shall be submitted to the procedure of conciliation provided for in existing inter-American agreements."

The *Convention for the Maintenance, Preservation and Reestablishment of Peace*, signed at Buenos Aires December 23, 1936 (*United States Treaty Series*, No. 922), provides that, "in the event that the peace of the American Republics is menaced, and in order to coordinate efforts to prevent war," any of the contracting Governments "shall consult with the other Governments of the American Republics, which, in such event, shall consult together for the purpose of finding and adopting methods of peaceful cooperation." The obligation in case hostilities actually break out is somewhat stronger: "In the event of war, or a virtual state of war between American States, the Governments . . . shall undertake without delay the necessary mutual consultations, in order to exchange views and to seek . . . a method of peaceful collaboration; and, in the event of an international war outside America which might menace the peace of the American Republics, such consultation shall also take place to determine the proper time and manner in which the signatory States, if they so desire, may eventually cooperate in some action tending to preserve the peace of the American Continent." In a *Convention to Coordinate, Extend and Assure the Fulfillment of the Existing Treaties between the American States* of the same date (*United States Treaty Series*, No. 926) the States agree that "while such consultation is in progress and for a period of not more than six months, the parties in dispute will not have recourse to hostilities or take any military action whatever" (Article 3). Article 5 provides that should hostilities break out between two or more contracting parties despite the exhaustion of agreed methods of pacific settlement, the contracting States "shall, in accordance with the terms of the *Treaty of Nonaggression and Conciliation* [see above, page 596] . . . adopt in their character as neutrals a common and solidary attitude; and shall consult immediately with one another, and take cognizance of the outbreak of hostilities in order to determine either jointly or individually, whether

such hostilities shall be regarded as constituting a state of war so as to call into effect the provisions of the present convention. . . . It is understood that, in regard to the question whether hostilities actually in progress constitute a state of war, each of the high contracting parties shall reach a prompt decision. . . .”

Taken altogether, the Bryan, Root, and Kellogg treaties, the various treaties with the American Republics, and the Hague Convention for the Pacific Settlement of International Disputes (1907) form a comprehensive system of obligations of pacific settlement to which the United States is a party, the extent of which has sometimes been lost sight of in discussions in recent years. (See Table, § 123.) It is significant, however, that with certain important States the United States has no bilateral obligations of pacific settlement.

§123. TABLE SHOWING STATUS OF SOME IMPORTANT

STATE (OR MEMBER OF THE LEAGUE OF NATIONS)	GENERAL OBLIGATIONS, UNITED STATES NOT A PARTY			OBLIGATIONS TO WHICH THE UNITED STATES IS A PARTY				
				GENERAL OBLIGATIONS			ARBITRATION OBLIGATIONS	
				Multilateral			Bilateral	
	Covenant, League of Nations (§ 115)	General Act, Pacific Settle- ment of International Disputes (§ 118)	Permanent Court of Inter- national Justice ^a (§ 116)	General Pact, Renuncia- tion of War ("Kellogg Pact") (§ 113)	Hague Convention (1907) Limiting Employment of Force for Recovery of Contract Debts (§ 131)	Hague Conventions (1899, 1907) for Pacific Settle- ment of International Disputes ^d (§ 114)	Treaty of Inter-American Arbitration, U.S.T.S. No. 886 (§ 122)	Bilateral Arbitration Treaty: "Root" or "Kellogg Arbitration" (§ 121)
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1. Abyssinia (Ethiopia)	*Ceased to exist 1936	*	*	*		*(1907) ^e		Kellogg Arbitra- tion Aug. 15, 1929
2. Afghanistan	*(1934)			*				
3. Albania	*Withdrawal effective 1941 ceased to exist 1939		*Optional Clause	*				Kellogg Arbitra- tion Feb. 12, 1929
4. Argentine Republic	*(1920)					*(1899)		
5. Austria	*Membership and exist- ence ceased March, 1938		*	*	*	*(1907) ^e		Kellogg Arbitra- tion Feb. 28, 1929
6. Belgium	*(1920)	*	*Optional Clause	*		*(1907)		Kellogg Arbitra- tion Aug. 25, 1930
7. Bolivia	*(1920)		*Optional Clause			*(1907)		
8. Brazil	*Withdrawal effective June 1928		*Optional Clause	*		*(1907)	*	Root Treaty July 26, 1916
9. Bulgaria	*(1920)		*Optional Clause	*		*(1899)		Kellogg Arbitra- tion July 22, 1929
10. Chile	*Withdrawal effective May 1940		*	*		*(1899)	*	
11. China	*(1920)		*	*	*	*(1907)		Kellogg Arbitra- tion Dec. 15, 1932
12. Colombia	*(1920)		*Optional Clause	*		*(1899)	*	
13. Costa Rica	*Withdrawal effective Jan. 1927			*				
14. Cuba	*(1920)		*	*		*(1907)	*	
15. Czechoslovakia	*Ceased to exist, 1939		*	*		*(1907)		Kellogg Arbitra- tion, Apr. 11, 1929
16. Danzig, Free City				*				
17. Denmark	*(1920)	*	*Optional Clause	*	*	*(1907)		Kellogg Arbitra- tion, Apr. 17, 1929
18. Dominican Republic	*(1924)		*Optional Clause	*		*(1899)	*	

For footnotes, see pages 608-609.

OBLIGATIONS OF PACIFIC SETTLEMENT (AS OF AUGUST, 1939)

OBLIGATIONS TO WHICH THE UNITED STATES
IS A PARTY

"COOLING OFF" OBLIGATIONS		TRUE CONCILIATION	GOOD OFFICES, MEDIATION	CONSULTA- TION	PREVENTION OF CON- TROVERSIES
Multilateral		Multilateral		Multilateral	
Treaty to Avoid or Prevent Conflicts between Ameri- can States ("Gondra" Treaty). U.S.T.S. No. 752 (§ 120)	Convention with Central American Republics for Establishment of Com- missions of Inquiry. U.S.T.S. No. 717	Convention of Inter- American Conciliation. U.S.T.S. No. 780 (§ 120)	Anti-War Pact of Non- aggression and Concla- tion. U.S.T.S. No. 906 (§ 120)	Inter-American Treaty on Good Offices and Media- tion, 1936. U.S.T.S. No. 925 (§ 122)	Convention for the Main- tenance, Preservation and Reestablishment of Peace, 1936. U.S.T.S. No. 992 (§ 122)
(9)	(10)	(11)	(12)	(13)	(14)
		Kellogg Conciliation Aug. 15, 1929			
		Kellogg Conciliation Oct. 22, 1928			
			*		
		Kellogg Conciliation Feb. 28, 1929			
		Kellogg Conciliation Aug. 25, 1930			
		Bryan Treaty Jan. 8, 1915	*		
*		Bryan Treaty Oct. 28, 1916	*	*	
		Kellogg Conciliation July 22, 1929	*		
*		Bryan Treaty Jan. 19, 1916	*	*	*
		Bryan Treaty Oct. 25, 1915			
*			*	*	*
*	*		*	*	*
*			*	*	*
		Kellogg Conciliation April 11, 1929			
		Bryan Treaty Jan. 19, 1915			
*			*	*	*

For footnotes, see pages 608-609.

§ 123. TABLE SHOWING STATUS OF SOME IMPORTANT OBLIGATIONS

STATE (OR MEMBER OF THE LEAGUE OF NATIONS)	GENERAL OBLIGATIONS, UNITED STATES NOT A PARTY			OBLIGATIONS TO WHICH THE UNITED STATES IS A PARTY			
				GENERAL OBLIGATIONS		ARBITRATION OBLIGATIONS	
				Multilateral			Bilateral
	Covenant, League of Nations (§ 115)	General Act, Pacific Settlement of International Disputes (§ 118)	Permanent Court of International Justice (§ 116)	General Pact, Renunciation of War ("Kellogg Pact") (§ 113)	Hague Convention (1907) Limiting Employment of Force for Recovery of Contract Debts (§ 131)	Hague Conventions (1866, 1907) for Pacific Settlement of International Disputes ⁴ (§ 114)	Treaty of Inter-American Arbitration, U.S.T.S. No. 886 (§ 122)
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
19. Ecuador	*(1934)			*		*(1899)	*
20. Egypt	*(1937)		*Optional Clause	*			
21. Estonia	*(1921)	*	*Optional Clause	*			
22. Finland	*(1920)	*	*Optional Clause	*	*	*(1907)	
23. France	*(1920)	*	*Optional Clause	*	*	*(1907)	
24. Germany	*Withdrawal effective Oct., 1935		*	*	*	*(1907)	
25. Great Britain (United Kingdom)	*(1920)	*	*Optional Clause	*	*	*(1899)	
26. Australia	*(1920)	*	*Optional Clause	*			
27. Canada	*(1920)	*	*Optional Clause	*			
28. India	*(1920)	*	*Optional Clause	*			
29. Ireland (Eire)	*(1923)	*	*Optional Clause	*			
30. New Zealand	*(1920)	*	*Optional Clause	*			
31. Union of S. Africa	*(1920)		*Optional Clause	*			
32. Greece	*(1920)	*	*Optional Clause	*		*(1899)	
33. Guatemala	*Withdrawal effective May 1938			*	*	*(1907)	*
34. Haiti	*(1920)		*Optional Clause	*	*	*(1907)	*
35. Honduras	*Withdrawal effective June 1938			*			*

For footnotes, see pages 608-609.

OF PACIFIC SETTLEMENT (AS OF AUGUST, 1939)—*Continued*OBLIGATIONS TO WHICH THE UNITED STATES
IS A PARTY

"COOLING OFF" OBLIGATIONS			TRUE CONCILIATION		GOOD OFFICES, MEDIATION	CONSULTATION	PREVENTION OF CONTROVERSIES
Multilateral		Bilateral	Multilateral		Multilateral		
Treaty to Avoid or Prevent Conflicts between American States ("Gondra" Treaty). <i>U.S.T.S.</i> No. 752 (§ 120)	Convention with Central American Republics for Establishment of Commissions of Inquiry. <i>U.S.T.S.</i> No. 717	"Bryan" or "Kellogg Conciliation" Treaties (§ 119)	Convention of Inter-American Conciliation. <i>U.S.T.S.</i> No. 780 (§ 120)	Anti-War Pact of Non-aggression and Conciliation. <i>U.S.T.S.</i> No. 906 (§ 120)	Inter-American Treaty on Good Offices and Mediation, 1936. <i>U.S.T.S.</i> No. 925 (§ 122)	Convention for the Maintenance, Preservation and Reestablishment of Peace, 1936. ⁱ <i>U.S.T.S.</i> No. 992 (§ 122)	Treaty on the Prevention of Controversies, 1936. <i>U.S.T.S.</i> No. 924
(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)
*		Bryan Treaty Jan. 22, 1916	*	*	*		*
		Kellogg Conciliation June 18, 1930					
		Kellogg Conciliation Jan. 14, 1929					
		Bryan Treat, Jan. 22, 1915					
		Kellogg Conciliation Feb. 25, 1929					
		Bryan Treaty Nov. 10, 1914					
		Kellogg Conciliation Sept. 23, 1932					
*	*		*	*		*	*
*			*	*	*	*	
*	*		*	*	*	*	*

For footnotes, see pages 608-609.

§ 123. TABLE SHOWING STATUS OF SOME IMPORTANT OBLIGATIONS

STATE (OR MEMBER OF THE LEAGUE OF NATIONS)	GENERAL OBLIGATIONS, UNITED STATES NOT A PARTY			OBLIGATIONS TO WHICH THE UNITED STATES IS A PARTY				
				GENERAL OBLIGATIONS		ARBITRATION OBLIGATIONS		
						Multilateral		
	Covenant, League of Nations (§ 115)	General Act, Pacific Settlement of International Disputes (§ 118)	Permanent Court of International Justice ^b (§ 116)	General Pact, Renunciation of War ("Kellogg Pact") (§ 113)	Hague Convention (1907) Limiting Employment of Force for Recovery of Contract Debts (§ 131)	Hague Conventions (1899, 1907) for Pacific Settlement of International Disputes ^d (§ 114)	Treaty of Inter-American Arbitration, U.S.T.S. No. 886 (§ 122)	Bilateral Arbitration Treaty: "Root," or "Kellogg Arbitration" (§ 121)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	
36. Hungary	*Withdrawal effective 1941		*Optional Clause	*	*	*(1907)		Kellogg Arbitration, July 24, 1929
37. Iceland				*				Kellogg Arbitration, Oct. 2, 1930
38. Iraq	*(1932)			*				
39. Italy	*Withdrawal effective Dec., 1939	*	*	*		*(1899)		Kellogg Arbitration, Jan. 30, 1931
40. Japan	*Withdrawal effective March 27, 1935		*	*	*	*(1907)		
41. Latvia	*(1921)	*	*Optional Clause	*				Kellogg Arbitration, July 10, 1930
42. Liberia	*(1920)			*	*			Root Treaty, Sept. 27, 1926
43. Lithuania	*(1921)		*Optional Clause	*				Kellogg Arbitration, Jan. 20, 1930
44. Luxemburg	*(1920)	*	*Optional Clause	*		*(1907)		Kellogg Arbitration, Sept. 2, 1930
45. Mexico	*(1931)			*		*(1907)	*	
46. Netherlands	*(1920)	*	*Optional Clause	*	*	*(1907)		Kellogg Arbitration, July 17, 1930
47. Nicaragua	*Withdrawal effective June 27, 1938			*	*	*(1907)	*	
48. Norway	*(1920)	*	*Optional Clause	*	*	*(1907)		Kellogg Arbitration, June 7, 1929
49. Panama	*(1920)		*Optional Clause	*	*	*(1907)	*	
50. Paraguay	*Withdrawal effective Feb. 1937		*	*		*(1907)		
51. Persia (Iran)	*(1920)		*Optional Clause	*		*(1899)		
52. Peru	*Withdrawal effective 1941	*	*Optional Clause	*		*(1899)	*	Kellogg Arbitration, June 29, 1929

For footnotes, see pages 608-609.

OF PACIFIC SETTLEMENT (AS OF AUGUST, 1939)—*Continued*OBLIGATIONS TO WHICH THE UNITED STATES
IS A PARTY

"COOLING OFF" OBLIGATIONS		TRUE CONCILIATION	GOOD OFFICES, MEDIATION	CONSULTA- TION	PREVENTION OF CON- TROVERSIES		
Multilateral		Bilateral	Multilateral		Multilateral		
Treaty to Avoid or Prevent Conflicts between Ameri- can States ("Cooling- Off Treaty") U.S.T.S. No. 752 (§ 120)	Convention with Central American Republics for Establishment of Com- missions of Inquiry. U.S.T.S. No. 717	"Bryan" or "Kellogg Conciliation" Treaties (§ 119)	Convention of Inter- American Conciliation. U.S.T.S. No. 780 (§ 120)	Anti-War Pact of Non- aggression and Conci- liation. U.S.T.S. No. 906 (§ 120)	Inter-American Treaty on Good Offices and Media- tion, 1936. U.S.T.S. No. 925 (§ 122)	Convention for the Main- tenance, Preservation and Reestablishment of Peace, 1936. U.S.T.S. No. 992 (§ 122)	Treaty on the Prevention of Controversies, 1936. U.S.T.S. No. 924
(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)
		Kellogg Conciliation July 24, 1929					
		Bryan Treaty March 19, 1915 ^a		*			
		Kellogg Conciliation July 10, 1930					
		Kellogg Conciliation Jan. 20, 1930					
		Kellogg Conciliation Sept. 2, 1930					
*			*	*	*	*	*
		Bryan Treaty Mar. 10, 1928 ^b					
*	*		*	*	*	*	*
		Bryan Treaty Oct. 21, 1914					
*			*	*	*	*	*
*		Bryan Treaty March 9, 1915	*	*		*	
*		Bryan Treaty March 4, 1915	*	*			

For footnotes, see pages 608-609.

§ 123. TABLE SHOWING STATUS OF SOME IMPORTANT OBLIGATIONS

STATE (OR MEMBER OF THE LEAGUE OF NATIONS)	GENERAL OBLIGATIONS, UNITED STATES NOT A PARTY			OBLIGATIONS TO WHICH THE UNITED STATES IS A PARTY			
				GENERAL OBLIGATIONS		ARBITRATION OBLIGATIONS	
				Multilateral			Bilateral
	Covenant, League of Nations (§ 115)	General Act, Pacific Settle- ment of International Disputes (§ 118)	Permanent Court of Inter- national Justice ^b (§ 116)	General Pact, Renuncia- tion of War ("Kellogg Pact") (§ 113)	Hague Convention (1907) Limiting Employment of Force for Recovery of Contract Debts (§ 131)	Hague Conventions (1899, 1907) for Pacific Settle- ment of International Disputes ^d (§ 114)	Treaty of Inter-American Arbitration, U.S.T.S. No. 886 (§ 122)
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
							Bilateral Arbitration Treaty: "Root" or "Kellogg Arbitration" (§ 121)
53. Poland	*(1920) Ceased to exist, 1939		*	*		*(1907)	Kellogg Arbitra- tion, Jan. 4, 1930
54. Portugal	*(1920)		*Optional Clause	*	*	*(1907)	Kellogg Arbitra- tion, Oct. 31, 1929
55. Rumania	*(1920)		*Optional Clause	*		*(1907)	Kellogg Arbitra- tion, July 22, 1929
56. Russia (U.S.S.R.)	*(1934) Expelled Dec. 1939			*	*	*(1907) ^e	
57. Salvador	*Withdrawal effective July 1939		*Optional Clause		*	*(1907)	*
58. Sa'udi Arabia (Hejaz)				*			
59. Siam (Thailand)	*(1920)		*Optional Clause	*		*(1907)	
60. Spain	*Withdrawal effective 1941	*a	*Optional Clause	*	*	*(1907)	
61. Sweden	*(1920)	*	*Optional Clause	*		*(1907)	Kellogg Arbitra- tion, Apr. 15, 1929
62. Switzerland	*(1920)	*	*Optional Clause	*		*(1907)	Kellogg Arbitra- tion, May 23, 1932 ^f
63. Turkey	*(1932)	*		*		*(1899)	
64. United States of America				*	*	*(1907)	*
65. Uruguay	*(1920)		*Optional Clause			*(1899)	Root Treaty Nov. 4, 1913
56. Venezuela	*Withdrawal effective 1940		*	*		*(1899)	*
57. Yugoslavia	*(1920)		*	*		*(1899)	

^a Denounced 1939.^b List based on publications, *P.C.I.J.*, Series E, No. 14.^c "Withdrew acceptance" of optional clause April 26, 1938.^d Only 1907 Convention is indicated in cases where States have ratified both Conventions.^e Not listed by the Court's Bureau in a list of Contracting Powers as of April 9, 1938.

OF PACIFIC SETTLEMENT (AS OF AUGUST, 1939)—*Concluded*OBLIGATIONS TO WHICH THE UNITED STATES
IS A PARTY

"COOLING OFF" OBLIGATIONS		TRUE CONCILIATION		GOOD OFFICES, MEDIATION	CONSULTATION	PREVENTION OF CONTROVERSIES	
Multilateral		Bilateral	Multilateral		Multilateral		
Treaty to Avoid or Prevent Conflicts between American States ("Gondra" Treaty). <i>U.S.T.S.</i> No. 752 (§ 120)	Convention with Central American Republics for Establishment of Commissions of Inquiry. <i>U.S.T.S.</i> No. 717	"Bryan" or "Kellogg Conciliation" Treaties (§ 119)	Convention of Inter-American Conciliation. <i>U.S.T.S.</i> No. 786 (§ 120)	Anti-War Pact of Non-aggression and Conciliation. <i>U.S.T.S.</i> No. 906 (§ 120)	Inter-American Treaty on Good Offices and Mediation, 1936. <i>U.S.T.S.</i> No. 925 (§ 122)	Convention for the Maintenance, Preservation and Reestablishment of Peace, 1936. <i>U.S.T.S.</i> No. 992 (§ 122)	Treaty on the Prevention of Controversies, 1936. <i>U.S.T.S.</i> No. 924
(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)
		Kellogg Conciliation Jan. 4, 1930					
		Bryan Treaty Oct. 24, 1914					
		Kellogg Conciliation July 22, 1929					
		Bryan Treaty March 22, 1915					
*			*	*	*		*
		Bryan Treaty Dec. 21, 1914					
		Bryan Treaty Jan. 11, 1915					
		Kellogg Conciliation May 23, 1932					
*	*	*	*	*	*	*	*
*		Bryan Treaty Feb. 24, 1915	*	*			
*			*	*		*	

¹ Same treaty as in Column 11.² Modified by U.S.T.S. No. 848, ratifications exchanged July 30, 1932.³ Signed Dec. 18, 1913.⁴ Same treaty as in Column 8.⁵ List of parties from Department of State *Bulletin* August 19, 1939.

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QUESTIONS AND PROBLEMS

1. Define, in terms of the definitions in § 112, the following terms: negotiation, good offices, mediation, conciliation, arbitration, judicial settlement.

The Kellogg Pact

2. Read carefully the terms of Article I of the Kellogg Pact (§ 113). What is it that the High Contracting Parties "condemn"? Does this "condemnation" mean that the Parties agree never to go to war?

What is it that the High Contracting Parties "renounce"? Does this "renunciation" extend to all uses of hostile force? Does it extend to all wars? Can you think of a war which is not "an instrument of national policy"? Is such a war forbidden by the Pact?

3. If, during the current hostilities in China, China declared that a state of war had been thrust upon her by act of Japan in invading Chinese territory, would this declaration have been in violation of the Kellogg Pact? Explain.

4. If, during the current hostilities in China, Japan had declared that a state of war had been thrust upon Japan by act of China in that China had disregarded the treaty rights of Japan in China, would such a declaration have been in violation of the Kellogg Pact? Explain. Or, if Italy, prior to sending troops into Ethiopian territory, had declared that Italy had recognized the state of war initiated by Ethiopia in violating the treaty rights of Italy in Ethiopia, would this declaration be in violation of the Kellogg Pact? Explain.

5. The following statement, originally made by the American Secretary of State before the American Society of International Law, April 28, 1928, was incorporated in a note of the United States Government to fifteen Governments during the negotiations prior to the signature of the Kellogg Pact. The note was sent June 23, 1928.

"(1) *Self-defense*. There is nothing in the American draft of an anti-war treaty [substantially the text printed in § 113] which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion

and it alone is competent to decide whether circumstances require recourse to war in self-defense. If it has a good case, the world will applaud and not condemn its action. Express recognition by treaty of this inalienable right, however, gives rise to the same difficulty encountered in any effort to define aggression. It is the identical question approached from the other side. Inasmuch as no treaty provision can add to the natural right of self-defense, it is not in the interest of peace that a treaty should stipulate a juristic conception of self-defense since it is far too easy for the unscrupulous to mold events to accord with an agreed definition."

Is it proper to assume that this is the interpretation attached by the United States to the Pact? Would Japan, China, Italy, and Ethiopia, as signatories of the Pact, be justified in saying that under it the United States had admitted that each of them had the right to determine for itself whether a given war was in self-defense?

6. Read carefully Article II of the Kellogg Pact. Compare the obligation there assumed with the obligations of pacific settlement of disputes assumed in the other documents in this chapter. Is this obligation more or less sweeping than that undertaken by the parties to the *Covenant of the League of Nations* (§ 115)? The parties to the *Hague Convention (I) for the Pacific Settlement of International Disputes* of 1907 (§ 114)? The Members of the Permanent Court of International Justice (§ 116)? The Treaties of Conciliation and Arbitration between Poland and the United States (§§ 119, 121)?

7. Examine the materials on the "Stimson Doctrine" ("nonrecognition") reprinted in § 26. Do you think this doctrine carries out the principles of the Kellogg Pact? Do you think this doctrine is efficacious, or that it ought to be supported by other measures? Discuss.

8. What is meant by the phrase "pacific means" in Article II of the Kellogg Pact? Specifically, suppose that State A attacks State B, occupying State B's territory with military forces. State A says there is no war, but merely "self-defense," "necessary protective measures," "intervention," etc. State B abstains from declaring war, or from declaring that war exists by act of State A. Is there any war in these circumstances? (Compare §§ 139-141.) Could State A claim that inasmuch as there is no war, its military occupation of State B is a "pacific means" as provided in the Kellogg Pact? Would such a claim be correct? What machinery does the Pact provide for dealing with such a claim?

9. Do you think the Kellogg Pact might be improved? If it were decided that it should be improved, are there any materials in the other documents in this chapter which might be of assistance?

The Hague Court of Arbitration

10. Into what main parts is the *Hague Convention (I) for the Pacific Settlement of International Disputes* of 1907 (§ 114) divided? Compare Article 1 of the Convention with the Kellogg Pact. To what extent are signatory powers to the Hague Convention bound to have recourse to diplomacy? To good offices and mediation? To international commissions of inquiry? To arbitration? In sum, does the Convention set up a system of obligatory ("compulsory") pacific settlement, or a system in which pacific settlement depends on the desires of the disputant States?

11. Under the *Hague Convention (I) for the Pacific Settlement of International Disputes* (§ 114), if States A and B are in dispute, may they ask State C to settle the dispute for them? Is this what the procedure of good offices and mediation calls for? What is the role of State C in such circumstances? Are States A and B bound by what State C proposes? Are States A and B bound to halt mobilization for war while this procedure is going on? Does the procedure in Article VIII of the Hague Convention change this procedure? What is the purpose of Article VIII?

Could State C offer its good offices or mediation without being asked to by States A and B? Does the Hague Convention oblige the disputant States to take any particular attitude in such a case? What is the force of recommendations made by State C: (a) When its proffer of mediation is not invited and is rejected by State A when made? (b) When its proffer of mediation is not invited but is accepted by States A and B when made? (c) When no reply is made by State B to the proffer of mediation, although State A accepts it? What is the force of a rejection of the proposals of State C (a) by State A; (b) by both States A and B, when the proffer of good offices of State C has been accepted by States A and B?

Can you find anything similar to this procedure in the *Covenant of the League of Nations* (§ 115)? Explain.

Do you think this procedure has any value as a means of pacific settlement? Explain.

12. If States A and B are in dispute, and are parties to the Hague Convention (§ 114), under what circumstances are they bound to establish a Commission of Inquiry? Under what circumstances may they establish such a Commission? Who determines when these circumstances exist? Could State C set up a Commission of Inquiry? Would the establishment of a Commission of Inquiry be possible without the prior agreement of States A and B to establish such a Commission?

What are the functions of a Commission of Inquiry when once established? What determines its powers? Describe the nature of the normal procedure of a Commission of Inquiry as far as it can be gathered from the terms of the Convention. What is the purpose of the procedure of the Commission? What is the nature of its report? Is it a settlement of the entire dispute between the disputant States? Is the report binding on the disputant States?

Would such Commissions be valuable in the settlement of all types of international disputes?

Define a Commission of Inquiry. Under what head would you classify such a Commission, in terms of § 112?

Can you find any similar method established in the *Covenant of the League of Nations* (§ 115)?

13. What is the definition of *arbitration* in the Hague Convention (§ 114)? Under this definition could arbitration take place in a case where the dispute was not one governed by international law? By some law?

Does the Hague Convention bind the signatory States to submit any class of disputes to arbitration? Who decides what disputes will be submitted to arbitration? Is it possible for a specific dispute to be submitted to arbitration under the Convention without a special and additional treaty submitting it to arbitration?

Once the disputant States agree to submit a dispute to arbitration and the arbitral tribunal has made its award, what is the obligation of the disputant

States? Does your answer to this question imply that under the Hague Convention arbitration is obligatory ("compulsory")? Discuss this question.

Do you find any comparable methods of arbitration set up in the *Covenant of the League of Nations* (§ 115)? Discuss.

14. How is the Permanent Court of Arbitration constituted under the Hague Convention (§ 114)? Do all the members of the Court serve in every arbitration? What is the purpose of the appointment of four persons by every signatory State? Is this appointment made only after a dispute has arisen between signatory States? How many individual arbitrators constitute the tribunal which sits in a particular dispute? How are these persons selected? Is there any danger that a selection will fail to be made? What are the qualifications of the individual members of each tribunal?

What determines the subject matter to be arbitrated?

15. The United States is a Member of the Permanent Court of Arbitration (§ 114). Could a dispute be subjected to arbitration before a tribunal of the Permanent Court of Arbitration in a matter which the United States did not desire to have arbitrated? Discuss in this connection the relation between Article 53 of the Convention and the reservation made by the Senate in its resolution advising ratification.

16. Are there any examples in this book of awards by a Tribunal of the Permanent Court of Arbitration?

17. Make a general summary of the value of the Permanent Court of Arbitration as a method of pacific settlement.

The League Covenant

18. Read carefully the *Covenant of the League of Nations* (§ 115). Make a list of the Articles in the Covenant dealing with the subject of pacific settlement of international disputes. Are such disputes the only matters dealt with in the Covenant?

19. Examine closely the provisions of Article 11 of the Covenant (§ 115). Under paragraph 1, is any specific class of disputes *referred* to the League? What action may the League take under this paragraph? Would you say that this authority of the League is narrow and precise, or broad and general?

Under paragraph 2, does the Covenant speak of the rights of the League, or of the rights of each Member of the League considered individually? Is the subject matter the same as in paragraph 1? In what cases may Members of the League act under paragraph 2? Precisely what may they do? May an individual Member proceed to the settlement of a dispute between two other Members under this paragraph?

Do you think that paragraphs 1 and 2 are connected? Explain. Do you think that ordinarily the League would act under paragraph 1 before an individual Member had acted under paragraph 2? Suppose States A and B to be in a state of strained international relations, and State C to feel concerned about the matter. Make a list of the steps which might be taken if all three States were Members of the League, under Article 11. Suppose State D were not a Member. What steps could it take?

In action taken under Article 11, does a majority of the Council or the Assembly suffice? Cite authority for your answer. What is its significance?

Does Article 11 remind you of any provision of *The Hague Convention (I) for the Pacific Settlement of International Disputes* (§ 114)?

20. Examine carefully the provisions of Article 12 of the Covenant (§ 115). How does this article differ from Article 11? How does it compare with Article II of the Kellogg Pact (§ 113)? Does this article deal with the powers of the League as a whole, or with the obligations which each Member undertakes? Under Article 12 is a Member bound to submit every possible dispute to pacific settlement? To any special method of pacific settlement? What are the choices of method left open?

What do the Members agree not to do pending pacific settlement of the dispute? Does this agreement preclude hostile military occupation which is not legal war? (See Chapter XIII.)

Does Article 12 provide specifically for methods of arbitration or judicial settlement?

21. Examine carefully and compare with one another Articles 12, 13, and 15 of the Covenant. Explain their relation to one another.

22. Does Article 13 of the Covenant envision any procedure for settling international disputes to be used before arbitration or judicial settlement is resorted to? Does this Article bind the parties to submit to arbitration or judicial settlement all disputes of the character described in its paragraph 2? What is the purpose of this paragraph? What, in general, is the class of disputes which is to be submitted to arbitration or judicial settlement?

Once the parties have agreed to submit a dispute to arbitration or judicial settlement, what result does the Covenant produce? Do the Members agree that they will go to war against a Member which does not accept the award? What is provided in case of a failure to carry out the award? Is this provision vague or definite? Compare it with the provisions of the *Geneva Protocol* (§ 117, especially Articles 10-11).

Of what importance is Article 14? Is it related in any way to the Statute printed as § 116?

23. Suppose that League Member States A and B have a dispute, and that States C, D, E, and F are also League Members. States A and B agree to submit the dispute to the Permanent Court of International Justice, which gives judgment favoring State A. State B refuses to accept this judgment. The Council of the League is unable to make any recommendations which will give effect to the judgment against State B. State A declares war on State B, and State C declares war on State B, both "in defense of the Covenant." State D declares war on State A. State E declares its neutrality. State F maintains that Article 15 of the Covenant should be applied.

Discuss the legality of the actions of States A, B, C, D, E, and F.

Does the discussion reveal any "loopholes" in the Covenant?

24. Is the assumption in problem 23, that the Council would be unable to agree, an unreasonable one? (See Article 5 of the Covenant.) Suppose, however, the Council, after State B has refused to accept the judgment of the Permanent Court of International Justice, does recommend action by the Members. Are the Members bound, under Article 13, to carry out the recommendations of the Council?

25. Examine Article 15 of the Covenant once more. With what class of disputes does Article 15 deal? What agency is used to settle disputes under Article 15? Is this agency always in existence, or is it set up especially to deal with a given dispute? Is this an advantage or not? Do both parties have to agree to submit a particular dispute to the Council under Article 15?

What action could the Council take under paragraph 3? Do you think paragraph 3 means that the Council should endeavor to bring the parties together (mediation, conciliation), or that the Council itself should hear the dispute and decide it, or that the Council should set up some independent agency to decide the dispute? Or might the Council do any or all of these things? Suppose the Council should itself hear and decide the dispute. What vote would be required in the Council? What vote would be required in the Council to adopt the decision or award of an agency it had set up to decide the dispute? Is this an advantage or a disadvantage?

Does paragraph 4 mean that the Council can decide the dispute by a majority vote? What does it mean? Are the Members bound under paragraph 4 to accept and put into effect the recommendations of the Council?

If the Council makes a report such as the one referred to in paragraph 6, does it mean that the Council has effected a settlement of the dispute under paragraph 3? Or does it mean that the Council is unable to do this and is acting under paragraph 4? What is the significance of your answer?

What is the difference in effect between a unanimous report by the Council and one which is not unanimous? What is meant by unanimity in this case? In case of such a unanimous report, do the Members bind themselves to take any specific action against a Member named as the aggressor in the report?

26. Read carefully Article 16 of the Covenant, and refer to §§ 133-137. Under what circumstances does Article 16 apply? If Member State A occupies territory of Member State B without a declaration of war on either side, and in violation of Articles 12, 13, or 15, does Article 16 apply automatically and of its own force? What would be necessary to determine whether Article 16 should be applied?

Does Article 16 abolish war?

Does Article 16 contain provision for the use of military forces? Are Member States bound to use military forces to protect the Covenant under this Article?

What are the economic "sanctions" provided in Article 16? What do you think of their prospective effectiveness? Suppose one powerful Member of the League, not a party to the dispute, failed to take these measures against an aggressor? Suppose a non-Member of the League failed to take such measures. What would then be the obligation of Members of the League? Is a non-Member of the League bound by Article 16? By Article 17? What is the significance of this?

27. Make a list of the "loopholes" in the Covenant: that is, the different possible cases in which the system of pacific settlement in the Covenant may fail to settle international disputes.

28. Write an essay on "The Relation of the Covenant of the League of Nations to the Kellogg Pact."

The World Court

29. What is the form of the *Statute of the Permanent Court of International Justice* (§ 116)? What is its connection with the *Covenant of the League of Nations* (§ 115)? Is every Member of the League *ipso facto* a Member of the Court?

How many judges has the Court? How are persons nominated for places on the Court? What qualifications are demanded of them? Is nomination tantamount to election? Who elects the judges to the Court? Is a new Court nominated or elected each time a dispute is submitted to the Court? How does the Court compare in this respect with the Permanent Court of Arbitration (§ 114)? Is any change made in the personnel of the Court by reason of the submission of any particular dispute to it? From the point of view of the influence of the disputing States on the makeup of the Tribunal, which do you regard as superior, the Permanent Court of International Justice or the Permanent Court of Arbitration?

How many judges sit in a particular case? How is this number secured?

30. Who may be parties in cases before the Permanent Court of International Justice? Could a Frenchman bring suit against the United States in that Court (if the United States were a Member) on account of a United States bond which the Government proposed to pay in devalued dollars? (Compare § 78.)

Read carefully Article 36 of the Statute. Does the phrase "The jurisdiction of the Court comprises all cases which the parties refer to it. . . ." constitute obligatory ("compulsory") jurisdiction of the Court? How does it compare with the provisions of the Hague Convention (§ 114) in this respect? Does the phrase "and all matters specially provided for in Treaties and Conventions in force" add an obligation of obligatory ("compulsory") arbitration? To what extent? Could a State Member of the Court be bound under this clause to submit to the Court any dispute it had not previously agreed to submit? Compare this provision and its effects with the reservation made by the United States Senate to Article 53 of the *Hague Convention (I) for the Pacific Settlement of International Disputes of 1907* (§ 114).

Is the second paragraph of Article 36 binding on all the States ratifying the World Court Protocol? Why is this paragraph called the "optional clause"? Why was acceptance of this clause made separate from the acceptance of the Statute as a whole? Examine it carefully. Does this clause establish obligatory ("compulsory") arbitration? Does this clause apply to all classes of disputes? To what class of disputes does it apply? What is your comment as to the correctness of the following statement: "A State which is a Member of the World Court but has not accepted the 'optional clause' is not bound by the Statute to submit to the Court any disputes which it has not already in other treaties agreed to submit to arbitration. A Member of the Court which has accepted the 'optional clause' is in the same position except with respect to 'legal' disputes, which it must submit to the Court if its dispute is with another State bound by the 'optional clause.' In no case except one in which the States concerned have previously agreed to do so, does the Statute require the submission of 'political' disputes to obligatory ('compulsory') adjudication."

31. What are the provisions of the *Statute of the World Court* (§ 116) as to Advisory Opinions?

32. Examine the Advisory Opinion of the World Court printed as § 34. What procedure is followed in asking Advisory Opinions? In this instance did the disputing States ask for the Advisory Opinion? Is an Advisory Opinion binding on the disputing States? What is its effect?

33. Enumerate the steps in the procedure from the first submission of a dispute to the Permanent Court of International Justice to the Court's judgment upon it.

The Geneva Protocol

34. Was the *Protocol for the Pacific Settlement of International Disputes* (§ 117) signed at Geneva ever put into effect?

What is the form of the Protocol? What is its relation to the Covenant of the League?

Read Article 2 of the Protocol carefully and compare it with the Kellogg Pact (§ 113). In what does this Article resemble the Pact? In what does it differ? Is there anything in your answer which sheds light on the subsequent provisions of the Protocol?

What is the object of Article 4 of the Protocol? What is the relation of paragraphs 1, 2, and 3 of this Article? When does paragraph 1 come into effect? What may the Council do under paragraph 1? What majority of the Council is required for this action? When does paragraph 2 come into effect? For what does paragraph 2 provide? Does paragraph 2 exclude the parties to the dispute from the procedure entirely in favor of the Council? By what majority does the Council act under paragraph 3? What action may the Council take under paragraph 3? What do the signatory States agree to do in the case of a unanimous report of the Council? Is this the same as their obligation under paragraph 6 of Article 15 of the Covenant of the League? Discuss the importance of this comparison.

If the Council fails to make a report which is unanimous except with respect to the votes of parties to the dispute, what happens under the League Covenant? What happens under the Protocol? By what majority must the Council act under paragraph 4 of Article 4 of the Protocol?

What is the meaning of paragraph 5 of Article 4 of the Protocol?

What obligations do the signatory States assume with respect to the results of the procedure in paragraph 4? What happens if a State fails to carry out an award by the Council or by an arbitral tribunal? Is this the same as what happens if it resorts to war in disregard of its undertakings?

35. What is the role of the Permanent Court of International Justice in the system set up by the Protocol (§ 117)? Why does the Protocol provide for the signature of the "optional clause" by States signatory to the Protocol?

36. What is the role of the Assembly of the League in the system set up by the Protocol (§ 117)?

37. What is the object of the provisions of Article 7 of the Protocol (§ 117)? Do these provisions come into effect before a dispute has arisen? Might the Council, under this Article, maintain a continuous supervision over the administration of "the position established by the Conference for the Reduction of Armaments provided for by Article 17 of the present Protocol"? Does the provision that the Council may take decisions by a two-thirds majority apply to the other articles of the Protocol?

38. Read carefully and as a whole Article 10 of the Protocol (§ 117). In what sense is it possible to call Article 10 the heart of the Protocol? Are States which resort to war in violation of their covenants regarded as the only aggressors under Article 10? Under what circumstances are States "presumed" to be aggressors? Would they be presumed to be aggressors in these cases if hostilities had not broken out? Does each interpret this presumption for itself? By what vote is the Council required to determine the aggressor? Will this vote always be obtainable? What happens if this vote is not obtained? Will the Council always be able to fix the terms of an armistice? What is the status of a violator of such an armistice when it is determined? Who determines when an armistice has been violated? By what vote? Who determines when sanctions shall be applied? By what vote?

39. Under the Covenant (§ 115), who determines when the sanctions of Article 16 are to be applied? Under the Protocol (§ 117)? Are the obligations of the States under Article 11 of the Protocol general or specific? Do Articles 12 and 13 clarify the situation? Does Article 13 depend for its effectiveness upon the action of the League or the willingness of the signatory States? Does Article 12 impose any obligations upon the signatory States? Comment on this situation.

40. Suppose that the Protocol (§ 117) had come into force, but that the United States had not ratified it; and that a dispute should arise between the United States and Great Britain, which had ratified it. What might happen under Article 16 of the Protocol? Would the United States be subject to any penalty under this Article if it did not "resort to war"?

41. Would the provisions of the Protocol, if it had come into force, have closed up completely the gaps or "loopholes" in the Covenant? Make lists in parallel columns of (a) "loopholes" in the Covenant, (b) methods by which the Protocol "plugs" these "loopholes," (c) "loopholes" not "plugged" either by the Covenant or the Protocol.

42. Suppose all States except the United States to have been Members of the League and parties to the Geneva Protocol. Enumerate the steps which might have taken place in connection with the Italo-Ethiopian controversy. (Compare §§ 133-137.)

United States Treaties of Pacific Settlement

43. What disputes must be submitted to the procedure provided in the Treaty of Conciliation between the United States and Poland (§ 119)? What is the function of the International Commission established in the treaty? Is it expected to settle the dispute? Are the parties bound to give effect to its action? Are the parties bound to anything pending the action of the Commission?

Is the procedure provided in the treaty similar to that in any other treaties entered into by the United States? Explain. Is it similar to any procedure provided in the *Covenant of the League of Nations* (§ 115)? In the *Hague Convention (I) for the Pacific Settlement of International Disputes of 1907* (§ 114)?

Do you think "conciliation" is the proper term for such a procedure as that set up by this treaty? How does this procedure compare with that described as conciliation in § 112?

44. What disputes are to be subjected to the procedure set up in the Treaty of Arbitration between the United States and Poland (§ 121)? Is this jurisdiction

wider or narrower than that set up in the Treaty of Conciliation between the same States (§ 119)?

Does the treaty set up any tribunal of arbitration, or does it depend upon tribunals to be set up by other agreements?

Under this treaty, does the United States agree in advance to submit any special type of dispute to arbitration? Explain. Under the terms of this treaty alone, and without further treaty, could a particular dispute of a legal character between the United States and Poland be submitted to arbitration? Explain.

Suppose a particular dispute to have been submitted to arbitration under the terms of this treaty, would the United States and Poland be bound by the award?

How does the definition of disputes to be arbitrated under the treaty compare with that in other arbitration obligations to which the United States is a party? With the definition of disputes susceptible of arbitration in the Hague Convention of 1907 (§ 114)? With the obligations of Members of the League of Nations (§ 115)? With the obligations of Members of the Permanent Court of International Justice (§ 116)? Does adherence to the "optional clause" make any difference in the latter case?

With what other States does the United States have obligations similar to the ones assumed in this treaty with Poland (See § 123)?

45. Suppose that the Government of Poland should repudiate large debts owed to the Government of the United States. Could the United States claim that the treaties in §§ 119 and 121 applied? Which treaty? Could Poland reply that the treaties did not apply, as the decision of Poland whether and to what extent it could pay its debts was solely "within the domestic jurisdiction" of Poland? What provisions do the treaties make for resolving such situations?

46. Suppose that the United States and France were bound by treaties like those in §§ 119 and 121 and that the United States without a declaration of war should occupy French Guiana with its military forces. Could France claim that any part of the treaties of arbitration applied if it sought arbitration? Could the United States reply that the treaties did not apply, as the operation in French Guiana involved "the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine"? What machinery do such treaties provide for the settlement of such questions?

47. Suppose that the Members of the Council of the League of Nations, including Poland, should vote under Article 16 of the Covenant to apply sanctions to State X as an aggressor. Among the sanctions voted is a prohibition of shipments of cotton or wheat to State X. An American merchant vessel bound with cotton and wheat for State X is intercepted and captured by a Polish war vessel. The United States stands on its rights as a non-Member of the League and as a neutral in the controversy between State X and the League Members, and demands arbitration with Poland under the Treaty. Poland replies that the Treaty is inapplicable because the question involves "the observance of the obligations of Poland in accordance with the Covenant of the League of Nations." Discuss and decide this question. (Students should examine here the materials in §§ 133-137.)

48. Study the table printed as § 123. Compare the substance of the obligations of pacific settlement undertaken by the United States (Hague Convention of 1907, Kellogg Pact, "Bryan Treaties," and treaties like those with Poland), with those of States Members of the League of Nations and the Permanent Court of International Justice. Debate this subject: *Resolved*, that the United States has assumed obligations of pacific settlement theoretically as effective as those undertaken by any State Member of both the League and the World Court (excluding the "Optional Clause").

49. "*Resolved*, that the United States has lived up to its obligations under Article II of the Kellogg Pact, by entering into treaties for the pacific settlement of international disputes." Debate this question, in the light of materials in this chapter, and such other materials as you can find.

50. In the light of § 123, are there any States with whom the United States has not contracted important obligations of pacific settlement? Does your answer have any special significance?

XIII

Measures of Redress Short of War

§ 124. MEASURES OF REDRESS SHORT OF WAR

NOTE BY THE EDITOR

When one State contends that another State has not fulfilled its obligations under international law, the nature of international law as a legal system requires that certain procedures be recognized by which the complaining State may obtain redress. The methods of pacific settlement discussed in Chapter XII, to the extent that they are obligatory upon the disputing States, provide ways of obtaining such redress. At the other extreme, international law recognizes war itself as a legal method of securing redress for failure to fulfill international obligations. See the materials in Chapter XIV below. There are a number of other methods, however, by which complaining States may show their displeasure and bring pressure to bear upon an offending State which is alleged to be internationally delinquent. Definitions vary widely, and mutually exclusive definitions are almost impossible, but the following methods are most often discussed: (1) severance of diplomatic relations; (2) nonintercourse; (3) embargo; (4) reprisals (including retorsion); (5) display of force; (6) pacific blockade; (7) armed intervention without war; (8) "sanctions" under the League of Nations Covenant.

It should be recognized at once that all these methods, as well as war itself, may be utilized by States, not only to secure their rights under international law, but for purposes of oppression, or even conquest, of their weaker neighbors. Nevertheless, just as a war seldom begins without each contender protesting that it is protecting its rights in international law against the enemy, so the measures mentioned above are seldom undertaken by a State without elaborate protestations that the adversary has been delinquent in fulfilling its international legal duties. The difficulty is that

each State is entitled to determine for itself, in the absence of treaties to the contrary, what its rights are under international law, and to act on this determination. In the absence of explicit and comprehensive obligations of pacific settlement, there is no objective method of determining precisely when international law has been violated. In large part the structure of treaties of pacific settlement represents an effort to fill this gap.

Although the measures to which this chapter is devoted differ in severity, they have the following premises in common: (1) the State (or States) applying them contend that they are required because the State to which they are applied has failed in its obligations under international law; (2) the complaining State acts ultimately on its own interpretation of what international law requires of its adversary. These premises apply even in the case of sanctions by Members of the League, since each Member determines for itself if a case has arisen in which sanctions are to be applied, and as to how far it will co-operate in the application of each particular sanction. Indeed, League sanctions may be properly regarded as a co-operative procedure by which a number of States reach an agreement as to when a given State has violated international law (the League Covenant) by a "resort to war," and as to the extent to which they can proceed co-operatively in applying to the recalcitrant State measures of the sort enumerated above and, in addition, acts of war.

It is important to understand, however, that when one State undertakes such measures on its own account it practically always sets forth elaborately that the adversary has been guilty of a violation of treaty or other rights secured to the complaining State under international law, redress of which by less stringent methods has become impracticable. That other States, or even "international public opinion," do not agree that there has been an international delinquency, or that the means of redress employed are called for in the circumstances, does not alter the right of the complaining State to its own construction of what international law requires of its adversary, and what measures of redress are appropriate in the circumstances.

Of one further general principle some mention should be made. It is that the punishment should fit the crime; more technically, that the measure of redress should be reasonably proportioned to the offense complained of. A mere indignity offered by one State to a citizen of another, for example, would hardly justify armed intervention or occupation to secure redress. Beyond such a trite generalization it is difficult to go. The principle is most exactly expressed in the case of what is called *retorsion*, a form of *reprisal* in which the offending State is visited by the complaining State, with the same type of act as that complained of. Thus an Act of Congress of April 18, 1818, provided that "the ports of the United States shall be and remain closed against every vessel owned wholly or in part by a subject . . . of his Britan-

nic majesty, coming or arriving from any port or place in a colony or territory of his Britannic majesty that is, or shall be, by the ordinary laws of navigation and trade, closed against vessels owned by citizens of the United States . . .”¹ This is also an example of *nonintercourse*. The principle of proportionality appears, however, throughout this vague and unsatisfactory domain of international law. It is of significance when questions involving acts of redress are submitted to arbitral tribunals, which unfortunately is seldom.

It seems fitting at this point to discuss the *Naulilaa Claim*, a case of reprisal, not only for the light it throws on the principle of proportionality, but for its more general significance. In 1914 a German official and two German officers of German Southwest Africa were killed by members of a Portuguese frontier post at Naulilaa. Two other Germans were wounded and interned. In reprisal, the Governor of German Southwest Africa ordered German forces to attack and destroy a number of forts and posts in Portuguese territory near the frontier. In addition a military expedition was sent to Naulilaa, a Portuguese fort. The defenders offered resistance, but were forced to retire, after which the Germans withdrew behind their boundaries. As a result of the withdrawal of the Portuguese, the evacuated regions were looted by native populations. A claim was put forward by Portugal for damages before a neutral arbitral tribunal, on the ground that the reprisals were unjustified and that Germany was responsible for the damage.

The Special Arbitral Tribunal held that Germany was responsible. First it examined the circumstances surrounding the death of the three Germans which had led to the reprisals, and found that it had been caused entirely by the fact that the Germans did not speak Portuguese, and that the Portuguese officer who ordered the shooting believed himself to be in danger. The Tribunal then declared: “A necessary condition for the legitimate exercise of the right of reprisals is the violation of a rule of international law by the State against which the reprisals are directed. There was no such violation in the present case, seeing that the death of the German officers was due to an accident caused by a misunderstanding.” Neither was the internment illegal. Moreover, “reprisals are illegal if they are not preceded by a request to remedy the alleged wrong,” and the German Governor had not made any such request to the Portuguese authorities before ordering the reprisals. Finally, “reprisals which are altogether out of proportion with the act which prompted them, are excessive and therefore illegal. This is so even if it is not admitted that international law requires that reprisals should be approximately of the same degree as the injury to which they are meant as an answer. In addition, Germany did not, in the pleadings, deny the require-

¹ 3 Stat. 432.

ment of proportionality. There was an obvious lack of proportion between the incident of Naulilaa and the reprisals which followed the incident.”²

Severance of diplomatic relations.—Severance of diplomatic relations takes place when a complaining State withdraws its diplomatic representative from the offending State, at the same time terminating the mission of the diplomatic representative of the offending State in the complaining State. This measure, while it involves no use of force, is a very serious one. It is usually taken only when a diplomatic controversy has reached an acute stage, and when both States are intransigent, as when Great Britain terminated its diplomatic relations with Mexico in 1938, on account of its denial of Mexico's right to expropriate properties owned by British nationals. Mexico severed diplomatic relations with the United States in 1914 after the occupation of Vera Cruz by American military forces. War did not result in either of these cases, for the breaking off of diplomatic relations in itself by no means necessarily implies the subsequent use of force. Sometimes, however, it is a prelude to the use of force or war. As a result of submarine activities which the United States considered contrary to international law, the President broke off diplomatic relations with Germany in February, 1917. The President announced to Congress: “I have, therefore, directed the Secretary of State to announce to the German Ambassador that all diplomatic relations between the United States and the German Empire are severed, and that the American Ambassador at Berlin will immediately be withdrawn; and, in accordance with this decision, to hand to his excellency his passports . . .” At the same time the President declared, “We do not desire any hostile conflict with the Imperial German Government . . . we purpose nothing more than the reasonable defense of the undoubted rights of our people.”³ Congress did not recognize the existence of a state of war (declare war) with Germany until April 6, 1917.

E. C. Stowell says: “Without going to the full length of a rupture of diplomatic relations, governments sometimes indicate their displeasure by temporarily withdrawing their representatives or placing the mission in charge of an inferior officer. Graded according to the seriousness of the procedure we might enumerate: (1) temporary absence of the diplomatic representative from his post; (2) placing the mission in charge of a lesser diplomatic representative; (3) withdrawing of the diplomats and leaving the mission in charge of a clerk or some consular officer; (4) the rupture of diplomatic relations and the turning over of the archives to the care of some

² *Annual Digest*, 1927-28, 526-527. The original report is in 8 *Recueil des Décisions des Tribunaux Arbitraux Mixtes*, 409, 422-425; see another translation in Briggs, *Law of Nations* (1938), 677.

³ *U. S. For. Rel.*, 1917 (*Supp.* 1), pp. 109, 111.

third power; and (5) the complete rupture of official relations including the withdrawal of consular officers.”⁴

Nonintercourse.—This is a name applied to a wide variety of measures the purpose of which is to cut off commercial, financial, or other relations, between residents of the complaining State and residents of the offending State. The Act of Congress of April 18, 1818, cited on page 624 above, presents a measure of nonintercourse. The embargo discussed in § 125 immediately below is another measure of nonintercourse, though *hostile* embargo is a war measure, not a measure of redress short of war. The provisions of Article XVI of the League Covenant envision a wide co-operative enforcement of measures of nonintercourse; and the measures adopted by the Co-ordination Committee for application against Italy in 1935 included prohibition of arms shipments to Italy, prohibition of flotation of Italian public or private loans and extension of credits, prohibition of importation of goods from Italian territory, and embargo on exports of certain goods (mainly useful for war purposes) to Italy. (See §§ 133-137, below.) In the modern world, with its complex international trade and financial relationships, nonintercourse measures thoroughly carried out could very well be more effective than war as a means of redress. Nonintercourse measures may also be used by neutral States as protective devices against being involved in war. See United States neutrality legislation reprinted below, §§ 190, 191. The principal objection to measures of nonintercourse is that they may injure the complaining State as much as they do the offending State. This was the case with the measures of nonintercourse taken by the United States against Great Britain and France, 1806-1812, and it was a very real cause of the reluctance of League of Nations Members to apply nonintercourse thoroughly against Italy.

§ 125. EMBARGO

The Boedes Lust

HIGH COURT OF ADMIRALTY OF ENGLAND, 1804

5 C. Robinson, 233.

[In May, 1803, Great Britain placed an embargo on all Dutch property in British ports, and the *Boedes Lust*, a vessel belonging to residents of Demerara, a Dutch colony, was seized. Subsequently war broke out between Holland and England, and in December, 1803, Demerara was ceded to England. The original owners now seek to recover the vessel.]

S. W. SCOTT: . . . The claim is given for several persons as inhabitants of Demerara, not settling there during the time of British possession, nor

⁴ *International Law* (1931), p. 472. By permission of Henry Holt and Company.

averring an intention of retiring when that possession ceased. They are therefore to be treated under this general view as Dutch subjects, unless it can be shewn that there are any other circumstances by which they are protected. It is contended that there are such circumstances, and that they are these: That the property was taken in a state of peace, and that the proprietors are now become British subjects, and consequently that this property could not be considered as the property of an enemy, either at the time of capture or adjudication. Now, with respect to the first of these pleas, it must be admitted, that alone would not protect them, because the Court has, without any exception, condemned all other property of Dutchmen taken before the war—And upon what ground?—That the declaration had a retroactive effect, applying to all property previously detained, and rendering it liable to be considered as the property of enemies taken in time of war. This property was seized provisionally, an act itself hostile enough in the mere execution, but equivocal as to the effect, and liable to be varied by subsequent events, and by the conduct of the Government of Holland. If that conduct had been such as to re-establish the relations of peace, then the seizure, although made with the character of a hostile seizure, would have proved in the event a mere *embargo*, or temporary sequestration. The property would have been restored, as it is usual, at the conclusion of embargoes; a process often resorted to in the practice of nations, for various causes not immediately connected with any expectations of hostility. During the period that this embargo lasted, it is said, that the Court might have restored, but I cannot assent to that observation; because, on due notice of embargoes, this Court is bound to enforce them. It would be a high misprision in this Court, to break them, by re-delivery of possession to the foreign owner of that property, which the Crown had directed to be seized and detained for further orders. The Court acting in pursuance of the general orders of the State, and bound by those general orders, would be guilty of no denial of justice, in refusing to decree restitution in such a case, for it has not the power to restore. Its functions are suspended by a binding authority, and if any injustice is done that is an account to be settled between the States. The Court has no responsibility, for it has no ability to act.

This was the state of the first seizure. It was at first equivocal; and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo, so terminated. That would have been the retroactive effect of that course of circumstances. On the contrary, if the transactions end in hostility, the retroactive effect is directly the other way. It impresses the direct hostile character upon the original seizure. It is declared to be *no embargo*, it is no longer an equivocal act, subject to two interpretations; there is a declaration of the *animus*, by which it was done, that it was done *hostili animo*, and is to be considered as an hostile measure

ab initio. The property taken is liable to be used as the property of persons, trespassers *ab initio*, and guilty of injuries, which they have refused to redeem by any amicable alteration of their measures. This is the necessary course, if no particular compact intervenes for the restitution of such property taken before a formal declaration of hostilities. No such convention is set up on either side, and the State, by directing proceedings against this property for condemnation, has signified a contrary intention. Accordingly, the general mass of Dutch property has been condemned on this retroactive effect; and *this* property stands upon the same footing as to the seizure, for it was seized at the same time, and with the same intent. . . .

At the time of the declaration of hostilities, then, this property stood exactly on the common footing; and the result of any proceeding then pronounced, must have been a sentence of condemnation: It lay open to the same legal conclusion at that time, but the Settlement [Demerara] has since surrendered to the British arms, and the parties are become British subjects; and this, it is said, takes off the hostile effect, although it might have attached. This argument, to be effective, must be put in one of these two ways, either that the condemnation pronounced upon Dutch property went upon the ground that, though seized in time of neutrality, it could not be restored *only*, because the parties were not now in a condition to receive it; or else, that though seized at a time, that may to some effects be considered as time of war, yet the subjects, having become friends, are entitled to restitution. This latter position cannot be maintained for a moment. It is contradicted by all experience and practice, even in the case of those who had an original British character. In the case of Mr. Whitehead, who had but just set his foot on the colony of an enemy for a few hours, but was proved to have gone there for the purpose of settling, his property was condemned, although at the time of adjudication he was again become a British subject, by the surrender of St. Eustatius to the British forces; and where property is taken in a state of hostility, the universal practice has ever been to hold it subject to condemnation, although the claimants may have become friends and subjects prior to the adjudication. The plea of having again become British subjects, therefore, will not relieve them, and the other ground must be resorted to. That is equally untenable in point of fact; for the condemnation of the other Dutch property proceeded on no such ground as the mere incapacity of the proprietors to receive restitution. It proceeded on the other ground, which I have before mentioned, the retroactive effect of the declaration, which rendered their property liable to be treated as the property of enemies at the time of seizure.

. . . the property, at the time of capture, belonged to subjects of the Batavian Republic, and is as such or otherwise liable to confiscation.

§ 126. REPRISALS

Gray, Administrator, v. The United States

COURT OF CLAIMS OF THE UNITED STATES, 1886

21 Ct. Cl. 340.

[One of the provisions of a treaty of 1800 between the United States and France was that the United States would relinquish claims of American citizens against France growing out of French depredations upon American commerce between 1791 and 1800. In 1885 Congress authorized American citizens having claims upon the French Government "arising out of illegal captures, detentions, seizures, condemnations, and confiscations," to bring suits in the Court of Claims, which was directed to "determine the validity and amount" of such claims. (23 Stat. 283.) Thus claims which had arisen against the French Government were assumed by the American Government, and it became necessary for the Court of Claims to decide as to their validity against the French Government in order to determine what burdens the American Government had assumed. In determining the validity of the claims as against the French Government, it was crucial whether the United States was to be regarded as at peace or at war with France. The present suit was brought for indemnity for loss of the *Sally*, an American vessel with an American cargo, which had been seized on a voyage from Massachusetts to Spain by a French privateer, taken to a French port and condemned for violation of French regulations "concerning the navigation of neutrals."]

DAVIS, J., delivered the opinion of the court:

This claim, one of the class popularly called "French spoliations," springs from the policy of the French revolutionary government between the execution of King Louis XVI and the year 1801, a policy which led to the detention, seizure, condemnation, and confiscation of our merchant vessels peacefully pursuing legitimate voyages upon the high seas. Over ninety years have these claims been the subject of discussion and agitation, first between the two nations, and then between the individuals injured and the Government of the United States. . . . [The extended account of the relations between the United States and France from 1777 to 1800 is omitted.]

The defendants contend that the seizures were justified, as war existed between this country and France during the period in question; and, as we could have no claim against France for seizure of private property in time of war, the claimants could have no resulting claim against their own Government; that is, the claims, being invalid, could not form a subject of

set-off as it is urged these claims did in the second article of the treaty of 1800. It therefore becomes of great importance to determine whether there was a state of war between the two countries.

It is urged that the political and judicial departments of each Government recognized the other as an enemy; that battles were fought and blood shed on the high seas; that property was captured by each from the other and condemned as prize; that diplomatic and consular intercourse was suspended, and that prisoners had been taken by each Government from the other and "held for exchange, punishment, or retaliation, according to the laws and usages of war." While these statements may be in substance admitted and constitute very strong evidence of the existence of war, still they are not conclusive, and the facts, even if they existed to the extent claimed, may not be inconsistent with a state of reprisals straining the relations of the States to their utmost tension, daily threatening hostilities of a more serious nature, but still short of that war which abrogates treaties, and after the conclusion of which the parties must, as between themselves, begin international life anew.

The French issued decree after decree against our peaceful commerce, but on the ground of military necessity incident to the war with Great Britain and her allies; they refused to receive our minister, but in that refusal, insolent though it was, there is nothing to show that war was intended, and the mere refusal to receive a minister does not in itself constitute a ground for hostilities.

The Attorney-General, Mr. Lee, in August, 1798, very strongly sustained the defendants' position, for he wrote the Secretary of State that there existed with France "not only an actual maritime war," but "a maritime war authorized by both nations"; that consequently France was an enemy, to aid and assist whom would be treason on the part of a citizen of the United States; but we cannot agree that this extreme position was authorized by the facts or the law.

Congress enacted the various statutes hereinafter referred to in detail, and when one of them, the act providing an additional armament, was passed in the House, Edward Livingston, who opposed it, said:

"Let no man flatter himself that the vote which has been given is not a declaration of war. Gentlemen know that this is the case."

Those were times of great excitement; between danger of international contest and the heat of internal partisan conflict statesmen could not look at the situation with the calmness possessed by their successors, and those successors, with some exceptions to be sure, regarded the relations between the countries as not amounting to war. The question has been carefully examined by authorized and competent officers of the political department

of the Government, and we may turn to their statements as expository of the views of that branch upon the subject. . . . [Similar views expressed in certain reports to Congress are omitted.]

Mr. Livingston reported to the Senate in 1830 that—

“This was not a case of war, and the stipulations which reconciled the two nations was not a treaty of peace; it was a convention for the putting an end to certain differences. . . . Nowhere is the slightest expression on either side that a state of war existed, which would exonerate either party from the obligations of making those indemnities to the other. . . . The convention which was the result of these negotiations is not only in its form different from a treaty of peace, but it contains stipulations which would be disgraceful to our country on the supposition that it terminated a state of war. . . . Neither party considered then they were in a state of war.” (Rep. 4, p. 445.) . . .

Finally, Mr. Sumner considered the acts of Congress as “vigorous measures,” putting the country “in an attitude of defense;” and that the “painful condition of things, though naturally causing great anxiety, did not constitute war.” (38th Cong., 1st Sess., Rep. 41, 1864.)

The judiciary also had occasion to consider the situation, and the learned counsel for defendants cites us to the opinion of Mr. Justice Moore delivered in the case of *Bas v. Tingy*, (4 Dall., 37), wherein the facts were as follows: Tingy, commander of the public armed ship the *Ganges*, had libeled the American ship *Eliza*, *Bas*, master, setting forth that she had been taken on the high seas by a French privateer the 31st March, 1799, and retaken by him late in the following April, wherefore salvage was claimed and allowed below. Upon appeal the judgment was affirmed. Each of the four justices present delivered an opinion.

Justice Moore, answering the contention that the word “enemy” could not be applied to the French, says:

“How can the character of the parties engaged in hostility or war be otherwise described than by the denomination of enemies? It is for the honor and dignity of both nations, therefore, they should be called enemies; for it is by that description alone that either could justify or excuse the scene of bloodshed, depredation, and confiscation which has unhappily occurred, and surely Congress could only employ the language of the act of June 13, 1798, towards a nation whom she considered as an enemy.”

Justice Washington considers the very point now in dispute, saying (p. 40):

“The decision of the question must depend upon . . . whether at the time of passing the act of Congress of the 2d of March, 1799, there subsisted a state of war between two nations. It may, I believe, be safely laid down that every

contention by force between two nations, in external matters, under the authority of their respective Governments, is not only war, but public war. If it be decreed in form it is called solemn and is of the perfect kind, because one whole nation is at war with another whole nation, and all the members of the nation declaring war are authorized to commit hostilities against the members of the other in every place and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition. But hostilities may subsist between two nations more confined in its nature and extent, being limited as to places, persons, and things, and this is more properly termed imperfect war, because not solemn, and because those who are authorized to commit hostilities act under special authority and can go no further than to the extent of their commission. Still, however, it is public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers. It is a war between the two nations, though all the members are not authorized to commit hostilities such as in a solemn war where the Government retains the general power."

Applying this rule he held that "an American and French armed vessel, combating on the high seas, were enemies," but added that France was not styled "an enemy" in the statutes, because "the degree of hostility meant to be carried on was sufficiently described without declaring war, or declaring that we were at war. Such a declaration by Congress might have constituted a perfect state of war which was not intended by the Government."

Justice Chase, who had tried the case below, said:

"It is a limited, partial war. Congress has not declared war in general terms, but Congress has authorized hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land, to capture unarmed French vessels, nor even to capture French armed vessels in a French port, and the authority is not given indiscriminately to every citizen of America against every citizen of France, but only to citizens appointed by commissions or exposed to immediate outrage and violence. . . . If Congress had chosen to declare a general war, France would have been a general enemy; having chosen to wage a partial war, France was . . . only a partial enemy."

Justice Patterson concurred, holding that the United States and France were "in a qualified state of hostility"—war "*quoad hoc*." As far as Congress tolerated and authorized it, so far might we proceed in hostile operations and the word "enemy" proceeds the full length of this qualified war, and no further.

The Supreme Court, therefore, held the state of affairs now under discussion to constitute partial warfare, limited by the acts of Congress.

The instructions to Ellsworth, Davie, and Murray, dated October 22, 1799, did not recognize a state of war as existing, or as having existed, for they said the conduct of France would have justified an immediate declara-

tion of war, but the United States, desirous of maintaining peace, contented themselves "with preparations for defense and measures calculated to defend their commerce." (Doc. 102, p. 561.) Yet all the measures relied upon as evidence of existing war had taken effect prior to the date of these instructions. So the ministers, in a communication to the French authorities, said, as to the acts of Congress, "which the hard alternative of abandoning their commerce to ruin imposed," that "far from contemplating a co-operation with the enemies of the Republic [they] did not even authorize reprisals upon her merchantmen, but were restricted simply to the giving of safety to their own, till a moment should arrive when their sufferings could be heard and redressed." (Doc. 102, p. 583.)

France did not consider that war existed, for her minister said that the suspensions [*sic*] of his functions was not to be regarded as a rupture between the countries, "but as a mark of just discontent" (15 Nov., 1796, Foreign Relations, vol. 1, p. 583), while J. Bonaparte and his colleagues termed it a "transient misunderstanding" (Doc. 102, p. 590), a state of "misunderstanding" which had existed "through the acts of some agents rather than by the will of the respective 'Governments,'" and which had not been a state of war, at least on the side of France. (Ib., 616.)

The opinion of Congress at the time is best gleaned from the laws which it passed. The important statute in this connection is that of May 28, 1798 (1 Stat. L., 561), entitled "An act more effectually to protect the commerce and coasts of the United States." Certainly there was nothing aggressive or warlike in this title.

The act recites that, whereas French armed vessels have committed depredations on American commerce in violation of the law of nations and treaties between the United States and France, the President is authorized—not to declare war, but to direct naval commanders to bring into our ports, to be proceeded against according to the law of nations, any such vessels "which shall have committed, or which shall be found hovering on the coasts of the United States for the purpose of committing, depredations on the vessels belonging to the citizens thereof; and also to retake any ship or vessel of any citizen or citizens of the United States which may have been captured by any such armed vessel."

This law contains no declaration or threat of war; it is distinctly an act to protect our coasts and commerce. It says that our vessels may arrest a vessel raiding or intending to raid upon that commerce, and that such vessel shall not be either held by executive authority or confiscated, but turned over to the admiralty courts—recognized international tribunals—for trial, not according to municipal statutes, as was being done in France, but according to the law of nations. Such a statute hardly seems necessary, for if it extended at all the police powers of naval commanders upon the high

seas it was in the very slightest degree, and it is highly improbable that then or now, with or without specific statutory or other authority, an American naval commander would in fact allow a vessel rightfully flying the flag of the United States to be seized on the high seas or near our coasts by the cruiser of another Government. But if the act did enlarge the power of such officers, and give to them authority not theretofore possessed, it tied them down to specified action in regard to specified vessels.

They might seize armed vessels only, and only those armed vessels which had already committed depredations, or those which were on our coast for the purpose of committing depredations, and they might retake an American vessel captured by such an armed vessel. This statute is a fair illustration of the class of laws enacted at this time; they directed suspension of commercial relations until the end of the next session of Congress, not indefinitely (June 13, 1798, *ib.* § 4, p. 566); they gave power to the President to apprehend the subjects of hostile nations whenever he should make "public proclamation" of war (July 6, 1798, *ib.*, 577), and no such proclamation was made; they gave him authority to instruct our armed vessels to seize French "armed," not merchant, vessels (July 9, 1798, *ib.*, 578), together with contingent authority to augment the army in case war should break out or in case of imminent danger of invasion. (March 2, 1799, *ib.*, 725.) Within a few months after this last act of Congress the Ellsworth mission was on its way to France to begin the negotiations which resulted in the treaty of 1800 and even the act abrogating the treaties of 1778 does not speak of war as existing, but of "the system of predatory violence . . . hostile to the rights of a free and independent nation." (July 7, 1798, *ib.*, 578.)

If war existed why authorize our armed vessels to seize French armed vessels? War itself gave that right, as well as the right to seize merchantmen, which the statutes did not permit. If war existed why empower the President to apprehend foreign enemies? War itself placed that duty upon him as a necessary and inherent incident of military command. Why, if there was war, should a suspension of commercial intercourse be authorized, for what more complete suspension of that intercourse could there be than the very fact of war? And why, if war did exist, should the President, so late as March, 1799, be empowered to increase the army upon one of two conditions, viz, that war should break out or invasion be imminent, that is, if war should break out in the future or invasion become imminent in the future?

Upon these acts of Congress alone it seems difficult to found a state of war up to March, 1799, while in February, 1800, we find a statute suspending enlistments, unless, during the recess of Congress, "war should break out with France." This is proof positive that Congress did not then consider war as existing, and in fact Ellsworth, Davie, and Murray were at the time

hard at work in Paris. In May following the President was instructed to suspend action under the act providing for military organization, although the treaty was not concluded until the following September.

This legislation shows that war was imminent; that protection of our commerce was ordered, but distinctly shows that, in the opinion of the legislature, war did not in fact exist.

Wheaton draws a distinction between two classes of war, saying:

"A perfect war is where one whole nation is at war with another nation, and all the members of both nations are authorized to commit hostilities against all the members of the other, in every case, and under every circumstance permitted by the general laws of war. An imperfect war is limited as to places, persons, and things [to which the editor adds]: Such were the limited hostilities authorized by the United States against France in 1798." (Lawrence's Wheaton, 518.)

There was no declaration of war; the tribunals of each country were open to the other—an impossibility were war in progress; diplomatic and commercial intercourse were admittedly suspended; but during many years there was no intercourse between England and Mexico, which were not at war; there was retaliation and reprisal, but such retaliations and reprisals have often occurred between nations at peace; there was a near approach to war, but at no time was one of the nations turned into an enemy of the other in such manner that every citizen of the one became the enemy of every citizen of the other; finally, there was not that kind of war which abrogated treaties and wiped out, at least temporarily, all pending rights and contracts, individual and national.

In cases like this "the judicial is bound to follow the action of the political department of the Government, and is concluded by it" (*Phillips v. Payne*, 92 U. S. R., 130); and we do not find an act of Congress or of the Executive between the years 1793 and 1801 which recognizes an existing state of solemn war, although we find statutory provisions authorizing a certain course "in the event of a declaration of war," or "whenever there shall be a declared war," or during the existing "differences." One act provides for an increase of the army "in case war shall break out," while another restrains this increase "unless war shall break out." (1 Stat. L., 558, 577, 725, 750; see also acts of Feb. 10, 1800, and May 14, 1800.)

We have already referred to the instructions of the Executive, which show that branch of the Government in thorough accord with the legislative on this subject, and the negotiations of our representatives hereinafter referred to were marked by the same views, while the treaty itself—a treaty of amity and commerce of limited duration—is strong proof that what were called "differences" did not amount to war. We are, therefore, of opinion

that no such war existed as operated to abrogate treaties, to suspend private rights, or to authorize indiscriminate seizures and condemnations; that, in short, there was no public general war, but limited war in its nature similar to a prolonged series of reprisals. . . .

§ 127. REPRISALS—DISPLAY OF FORCE—PACIFIC BLOCKADE

NOTE BY THE EDITOR

Reprisals are defined by E. C. Stowell as "various acts or measures of remedial force short of war employed in international relations," and he adds that "in order to observe the requirement that no unnecessary force be used, any state having recourse to reprisals must employ those acts of reprisal which are as mild and delimited as the exigencies of the remedial requirements will permit.¹ So defined, reprisals include practically all the measures treated in this chapter, except severance of diplomatic relations; the principles are discussed above at page 624. Stowell lists both sequestration and embargo as reprisals (*The Boedes Lust*, § 125); seizure of vessels or merchandise on the high seas (*Gray v. U. S.*, § 126); seizure of public vessels or property of the offending State; confiscation of seized property; detention or expulsion of individuals of the offending State; pacific blockade; pacific occupation (see § 128 below) and punitive expeditions; and acts of force. He classifies retorsions and displays of force separately from reprisals, however, though retorsion is clearly a special type of reprisal, and displays of force are ordinarily used in the expectation that they will have the same coercive effect as the use of force.

A case of reprisal occurred during the Spanish Civil War 1936-1939, after the Spanish Government forces seized the German merchant vessel *Palos* at a point contended by the German Government to be outside Spanish territorial waters, and took off "forbidden freight" and two agents of the Spanish insurgents. Since the German Government had not recognized the belligerency of the Spanish Government, this was contended to be illegal. The German Government demanded release of the vessel, freight, and the two passengers. Upon release of the vessel only, a German cruiser seized the Spanish vessels *Argonne* and *Marta Junquera*. The German Government declared: "After the Red Rulers in Bilbao refused to surrender to the German cruiser *Koenigsburg* the passengers and part of the cargo retained from the steamer *Palos*, the German Government, as previously announced, saw itself compelled to enforce its demands through counter measures. In pursuit of this necessity to defend German sovereign rights

¹ *International Law* (1931), pp. 479, 480.

against an act of piracy² a Red Spanish steamer has been seized provisionally by the German naval forces in Spanish waters.”³

Displays of force are simply the ostentatious demonstration of military or naval power in such circumstances as to convince or intimidate an offending State and bring it to terms. It is a method which, of course, can be used as easily to extort concessions unjustly as to secure the enforcement of international rights. The United States has frequently secured its ends in the Caribbean States and China by having naval vessels appear at the appropriate place and time.⁴ The trip of a United States squadron around the world in 1908 was generally interpreted as a display of force against Japan and, in the opinion of President Roosevelt, induced Japan to cease making trouble on questions outstanding with the United States. Display of force is, of course, to be sharply distinguished from the use of force. The dangers of the display of force are obvious, and particularly so in the case of *mobilization*, which, used as a means of securing the observance of rights, may easily induce countermobilization and the outbreak of hostilities. Thus the Russian mobilization of 1914 was one of the reasons given by Germany for declaring war upon that State. The German peacetime mobilization of August–September, 1938, was obviously aimed at coercing European States into acceptance of alleged German rights in Czechoslovakia, while the maneuvers of the British fleet in the North Sea were equally a counterdisplay of force, designed at meeting intimidation with intimidation.

Pacific blockade.—This is an act of reprisal by which the complaining State utilizes naval forces to prevent ingress or egress from the ports of the offending State. It differs radically from war blockade, in that war blockade permits the blockading State to prevent ingress or egress of the vessels of all States, including neutrals, to or from the legally blockaded ports; while in the case of a pacific blockade, third States do not admit any right of the blockading State to interfere with the passage of their ships. The practice is to sequester intercepted vessels, not to confiscate them. Hindmarsh in 1933 listed twenty-three cases of pacific blockade since the first example, that by Great Britain against Norway in 1814. “Nine of the total number were instituted to compel reparation for wrongs amounting to international delinquencies and these may, therefore, be regarded as reprisals. . . . The remaining instances . . . are mainly examples of intervention for political or allegedly humanitarian purposes.”⁵

The most important case in which pacific blockade is supposed to have been considered by an arbitration tribunal was that of the *Venezuelan*

² The seizure of the *Palos* was hardly an act of piracy. See §§ 33, 62.—Ed.

³ N. J. Padelford, “International Law and the Spanish Civil War,” 31 *A.J.I.L.* (1937), 226, 238-239.

⁴ See A. E. Hindmarsh, *Force in Peace* (1933), pp. 61-64.

⁵ *Ibid.*, pp. 72-73.

Preferential Claims, decided by the Hague Tribunal of Arbitration in 1904. The effect of its award was to give preferential treatment to the claims of Great Britain, Germany, and Italy against Venezuela, as compared with the claims of other States upon that country. Great Britain, Germany, and Italy had proposed to establish in 1901 what first was called a pacific blockade against Venezuela; but upon the objection of the United States that it did not recognize as a valid proceeding a pacific blockade which adversely affected the rights of neutrals, Germany stated that it was the intention to establish a warlike blockade: that while it was not intended to make a formal declaration of war, a state of war would actually exist, and the warlike blockade would be attended with all the conditions of such a measure, just as if war had been formally declared. The United States acquiesced on assurances that no permanent acquisition of Venezuelan territory was intended; the three powers established the blockade and seized certain customhouses. Subsequently, through the insistence of the United States, negotiations between Venezuela and the blockading and other claimant States resulted in agreements by which Venezuela submitted the claims to mixed commissions. The blockading powers, however, contended that they were entitled to preferential treatment as compared with the nonblockading powers. This question was submitted to arbitration by the Permanent Court of Arbitration at The Hague, which decided in favor of the blockading States. The award was based partly on the fact that in the agreements with the blockading powers Venezuela had specifically recognized the justice of their claims, which was not the case in the agreements with the nonblockading powers. While the Tribunal declared that it considered itself "absolutely incompetent to give a decision as to the character or the nature of the military measures undertaken" by the blockading powers, it consistently treated the blockade as a war blockade, by such statements as "after the war . . . no formal treaty of peace was concluded between the belligerent powers," "the belligerent powers," "the warlike operations of the three European powers," "the neutral powers, having taken no part in the warlike operations against Venezuela, could in some respects profit by the circumstances created by those operations, but without acquiring any new rights," and so on. It is submitted that the award is only explicable as being based on the idea of a war blockade, although it does establish that a war blockade can secure a preferred position for its instigators with few of the other accompaniments of war.⁶

⁶ The text may be found in Wilson, *Hague Arbitration Cases* (1915), p. 34; Scott, *Hague Court Reports* (1916), p. 56.

On pacific blockade, see A. E. Hindmarsh, *Force in Peace* (1933), especially pp. 71-81; A. E. Hogan, *Pacific Blockade* (1908); H. P. Falcke, *Le Blocus Pacifique* (1919); M. Giraud, "Memorandum on Pacific Blockade up to the Time of the Foundation of the League of Nations," *League of Nations Official Journal*, 1927, p. 841.

§ 128. ARMED INTERVENTION WITHOUT WAR: UNITED STATES IN HAITI, 1915

In 1915 various American interests in Haiti were threatened by the recurring social and political disorders within the country. The Haitian National Railroad had come into the hands of Americans, and its unprofitable operations had led to an attempted foreclosure by the Haitian Government, which was prevented only by the intercession of the United States. American interests controlled a sugar mill, a wharf, an electric light plant, a tramway, and another unprofitable railroad. In connection with a loan made in 1910, however, the National City Bank of New York became the principal American stakeholder in Haiti. Under its contract with the Haitian Government, the Haitian National Bank (controlled by the National City Bank) was to act as sole depository for the funds of the Haitian Government. The Bank existed principally to assure payment of the Haitian foreign loans out of these funds, but it had been accustomed to make advances for current expenses to the Haitian Government. In 1914 these advances were refused because of differences between the Government and the Bank over a Haitian law suspending the retirement of fiduciary currency, and the Government issued eight billion gourdes in paper money, which the Bank refused to recognize as legal tender.

In this controversy the Bank was strongly supported by the United States Department of State, because of the large American interests involved in the position of the National City Bank and the possibility of European intervention; this situation ultimately resulted in the intervention by armed forces and the ratification of the treaty with Haiti reproduced below.

American marines were withdrawn from Haiti August 15, 1934. The Treaty of 1915 printed below expired May 3, 1936.

Intervention and the Treaty, 1915

A. C. Millspaugh, *Haiti under American Control*, pp. 204-216, by permission of Mr. Millspaugh and the World Peace Foundation.

THE ACTING SECRETARY OF THE NAVY TO ADMIRAL WILLIAM B. CAPERTON ¹

File No. 838.00/1276

[Telegram]

NAVY DEPARTMENT
Washington, July 28, 1915

State Department desires that American forces be landed Port au Prince and that American and foreign interests be protected; that representatives England, France be informed this intention; informed that their interests will be protected, and that they be requested not land. In acting this request be guided your knowledge present condition Port au Prince and act at discretion. Department has ordered U. S. S. *Jason* with marines Guantá-

¹ U. S. *For. Rel.*, 1915, pp. 475-476. The citations are Mr. Millspaugh's.—Ed.

namo, Cuba, proceed immediately Port au Prince. If more forces absolutely necessary wire immediately.

(Signed) BENSON

ADMIRAL CAPERTON TO THE SECRETARY OF THE NAVY ²

File No. 838.00/1276

[Telegram]

Port au Prince, *August 2, 1915*

23302. Large number Haitian revolutions largely due existing professional soldiers called *cacos*, organized in bands under lawless and irresponsible chiefs who fight on side offering greatest inducements, and but nominally recognize the Government. *Cacos* are feared by all Haitians and practically control politics. About 1,500 *cacos* now in Port au Prince, ostensibly disarmed but retain organization and believed to have arms and ammunition hidden. They have demanded election Bobo President, and Congress, terrorized by mere demand, is on point complying but restrained by my request. Present condition no other man can be elected account fear of *cacos*. Believe can control Congress. Can prevent any *cacos* outbreak in Port au Prince after arrival regiment of marines U. S. S. *Connecticut*. Stable government not possible in Haiti until *cacos* are disbanded and power broken. Such action now imperative Port au Prince if United States desires to negotiate treaty for financial control Haiti. To accomplish this must have regiment of marines in addition that on *Connecticut*. Majority populace well disposed and submissive will welcome disbanding *cacos* and stopping revolutions. Should agreement with Haiti be desired recommend Captain Beach, U. S. N., be appointed single commissioner for United States with full instructions and authority. He has conducted my negotiations on shore and I believe has confidence generally of Haitians. As future relations between United States and Haiti depend largely on course of action taken at this time earnestly request to be fully informed of policy of United States.

(Signed) CAPERTON

ADMIRAL CAPERTON TO THE SECRETARY OF THE NAVY ³

[Telegram—Excerpt]

Port au Prince, *August 5, 1915*

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Great relief expressed by all classes except *cacos* at presence of American troops. Americans afford hope of relief from government by terror. Univer-

² *Ibid.*, 1915, pp. 477-478; *Hearings*, p. 313.

³ *Ibid.*, p. 312.

sally believed that if Americans depart, Government will lapse into complete anarchy. My opinion is that United States must expect to remain in Haiti until native government is self-sustaining and people educated to respect laws and abide by them. Should President be elected now there would be complete machinery for all Government functions. With American protection and influenced by United States, progress toward good government could be soon commenced. Haitian people anxious to have President elected, because at present no central Government in Haiti except as directed by me. Also people uneasy, fearing United States may not permit continuance of Haitian independence.

(Signed) CAPERTON

PROCLAMATION OF THE UNITED STATES ⁴

U.S.S. "WASHINGTON," FLAGSHIP

Port au Prince, Haiti, August 9, 1915

I am directed by the United States Government to assure the Haitian people that the United States has no object in view except to insure, to establish and to help maintain Haitian independence and the establishment of a stable and firm government by the Haitian people.

Every assistance will be given to the Haitian people in their attempt to secure these ends. It is the intention to retain the United States forces in Haiti only so long as will be necessary for this purpose.

(Signed) W. B. CAPERTON

*Rear Admiral, United States Navy,
Commanding U. S. Forces in Haitian Waters*

THE ACTING SECRETARY OF THE NAVY TO ADMIRAL CAPERTON ⁵

Received August 10, 1915

Allow election of President to take place whenever Haitians wish. The United States prefers election of Dartiguenave. . . .

(Signed) BENSON, *Acting*

THE SECRETARY OF STATE TO CHARGÉ D'AFFAIRES ROBERT BEALE DAVIS, JR. ⁶

File No. 838.00/1276a

[Telegram]

DEPARTMENT OF STATE

Washington, August 10, 1915, noon

In view of the fact that the Navy last night informed Admiral Caperton that he might allow election of a President whenever the Haitians wish, and

⁴ U. S. For. Rel., p. 481.

⁵ *Hearings*, p. 315.

⁶ U. S. For. Rel., 1915, pp. 479-480.

of the impression which exists here that the elections may take place Thursday next, it is desired that you confer with the admiral to the end that, in some way to be determined between you, the following things be made perfectly clear:

First: Let Congress understand that the Government of the United States intends to uphold it, but that it can not recognize action which does not establish in charge of Haitian affairs those whose abilities and dispositions give assurances of putting an end to factional disorders.

Second: In order that no misunderstanding can possibly occur after election, it should be made perfectly clear to candidates as soon as possible and in advance of their election, that the United States expects to be intrusted with the practical control of the customs, and such financial control over the affairs of the Republic of Haiti as the United States may deem necessary for an efficient administration.

The Government of the United States considers it its duty to support a constitutional Government. It means to assist in the establishing of such a Government, and to support it as long as necessity may require. It has no design upon the political or territorial integrity of Haiti; on the contrary, what has been done, as well as what will be done, is conceived in an effort to aid the people of Haiti in establishing a stable Government and in maintaining domestic peace throughout the republic.

(Signed) LANSING

THE SECRETARY OF STATE TO CHARGE DAVIS ⁷

File No. 711.38/22c

[Telegram]

DEPARTMENT OF STATE

Washington, *August 18, 1915, 5 p. m.*

As soon after ratification as possible, the department contemplates using its unofficial good offices to obtain immediate renewal of railroad construction so as to furnish means of livelihood for some of the large number of unemployed throughout the country.

Meanwhile and in order to provide sustenance for starving natives and to bring in marauders who constitute a grave public menace, it is desired that you confer with Admiral Caperton to the end that under his direction such public works may be conducted as will relieve the urgent need for employment and cause those who now promote factional disorders and unrest to lay down their arms and desist from efforts to foment strife. Extreme care should be taken not to exceed the customary scale of wages

⁷ *Ibid.*, 1915, pp. 434-435.*

for such employment and every safeguard should be observed to insure that each individual receive his full due and be protected absolutely from all forms of petty graft. Admiral Caperton will therefore receive instructions to take charge, if possible upon the invitation of the *de facto* authorities, of such customhouses as are necessary to provide the funds: (1) to employ, keep occupied and pay the individuals in question; (2) to establish peace throughout the country; (3) to support the Dartiguenave Government.

To aid in the establishment of peace and in order to give the people renewed trust and confidence and to inspire them in the pursuits of industry and commerce, it is thought desirable that you confer with Archbishop Conan to the end that it be proclaimed to the natives through the clergy, and where possible by an American officer through the clergy, that they will be protected from interference in their rights to barter and sell their products and to enjoy the fruits of their labors.

(Signed) LANSING

THE SECRETARY OF STATE TO CHARGÉ DAVIS ⁸

File No. 711.38/25a

[Telegram]

DEPARTMENT OF STATE

Washington, August 22, 1915, 2 p. m.

For your guidance in informal conversations with the *de facto* President, you may use the following as your views of the motives and purposes of the Government of the United States:

To establish a stable government and lasting domestic peace so that the Haitian people may safely enjoy their full rights of life, liberty and property and all patriotic citizens may be encouraged to participate in the development of their country, the treaty submitted ought to be ratified immediately, and at the same time the Haitian Government should invite this Government to enter into a *modus vivendi* embodying the same terms as the treaty and to operate thereunder until the United States Senate has acted upon the treaty.

You might express the conviction that, in case such a request for a *modus* was made, the Haitian Government would not find this department unsympathetic toward any proper effort which might be made to place the Haitian finances on a sound basis so that the Haitian Government may be able to pay promptly adequate salaries to its officials; to establish a good school system; to build roads and generally facilitate the transportation and marketing of the products of the country; to extend and perfect the present

⁸ *Ibid.*, pp. 435-436.

telegraph lines and erect and maintain wireless stations; to undertake harbor improvements and municipal sanitation; and, by carrying on public works of this nature, to furnish employment to the people and afford them opportunities to improve their industrial and intellectual condition.

To the end that this economic development may be freely and safely undertaken by the Haitian people, it seems indispensable to organize and maintain a trained constabulary which will take the place of the Haitian army and which, well officered and properly equipped and disciplined, will possess sufficient power to preserve order, suppress insurrections and protect life and property throughout the republic.

With the great resources of Haiti undeveloped because of the frequent political disorders and the constant danger to life and property, the *de facto* President must desire to adopt measures which will remove these obstacles. Believing him to be inspired by patriotic motives and the sincere purpose to improve the conditions of the Haitian people by maintaining peace and securing to them their individual rights, he [*sic*] will undoubtedly aid in carrying out the steps suggested. In his efforts he may confidently expect the United States, which seeks only the welfare of Haiti and its people, to give to him such protection and assistance as it may properly render.

(Signed) LANSING

THE SECRETARY OF STATE TO CHARGÉ DAVIS⁹

File No. 711.38/24

[Telegram]

DEPARTMENT OF STATE
Washington, *August 24, 1915, 9 p. m.*

The United States desires to deal justly and considerately with Haitians. It covets no Haitian territory, nor does it desire to usurp Haitian sovereignty or seek treaty conditions other than for the welfare of the Haitian people.

.

. . . If the previous understanding, which has influenced the conduct of this Government, does not result in a prompt ratification of the treaty, then this Government will be compelled to consider the adoption of one of the following courses: First, establishing there a military government until honest elections can be held; second, permitting the control of the Government to pass to some other political faction representative of the best elements of Haiti whose members will be willing to join in the prompt reestablishment of a stable government and permanent domestic peace.

⁹ *Ibid.*, 1915, pp. 437-438.

In the event of the resignation of *de facto* authorities, Admiral Caperton will be instructed immediately to take the necessary means to accomplish one or the other of the two objects.

Use the foregoing discreetly and orally impress upon the President-elect, and his supporters, serious consequences which may result if they should force this Government to adopt one of the above alternatives. It seems to this Government that the adoption of the treaty as proposed is the simplest method of establishing the stable and efficient government desired by all.

(Signed) LANSING

THE SECRETARY OF STATE TO CHARGE DAVIS ¹⁰

File No. 711.38/27

[Telegram]

DEPARTMENT OF STATE

Washington, *September 1, 1915, 1 p. m.*

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The United States, compelled by the appalling conditions in Haiti to undertake the establishment of peace in the republic, is fully convinced that the proposed convention is necessary to make peace permanent and to give Haiti a new basis of credit.

The next concern of the United States is to see prosperity throughout the republic. Haiti should appreciate that means for economic and industrial development can not come from within and that foreign capital must be sought and secured, and this can not be expected unless there is reasonable assurance against internal dissensions. Therefore the period during which peace in Haiti is assured will measure the extent to which foreigners may be expected to invest in the country. Not until the proposed convention is ratified and those in authority manifest a disposition to pursue a progressive policy for the development of Haiti, can foreign capital be expected.

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... There should be no apprehension that the United States will abandon those who may be instrumental in adopting or carrying out the plan proposed.

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(Signed) LANSING.

¹⁰ *Ibid.*, 1915, pp. 440-441.

TREATY BETWEEN THE UNITED STATES AND HAITI. FINANCES, ECONOMIC
DEVELOPMENT AND TRANQUILLITY OF HAITI. SIGNED AT
PORT AU PRINCE, SEPTEMBER 16, 1915¹¹

By The President of the United States of America

A PROCLAMATION

Whereas a Treaty between the United States of America and the Republic of Haiti having for its objects the strengthening of the amity existing between the two countries, the remedying of the present condition of the revenues and finances of Haiti, the maintenance of the tranquillity of that republic, and the carrying out of plans for its economic development and prosperity, was concluded and signed by their respective plenipotentiaries at Port au Prince, on the sixteenth day of September, one thousand nine hundred and fifteen, the original of which treaty, being in the English and French¹² languages, is word for word as follows:

Preamble

The United States and the Republic of Haiti desiring to confirm and strengthen the amity existing between them by the most cordial cooperation in measures for their common advantage;

And the Republic of Haiti desiring to remedy the present condition of its revenues and finances, to maintain the tranquillity of the republic, to carry out plans for the economic development and prosperity of the republic and its people;

And the United States being in full sympathy with all of these aims and objects and desiring to contribute in all proper ways to their accomplishment;

The United States and the Republic of Haiti have resolved to conclude a Convention with these objects in view, and have appointed for that purpose, plenipotentiaries,

The President of the United States, Robert Beale Davis, Jr., chargé d'affaires of the United States;

And the President of the Republic of Haiti, Louis Borno, secretary of state for foreign affairs and public instruction, who, having exhibited to each other their respective powers, which are seen to be full in good and true form, have agreed as follows:

ART. I. The Government of the United States will, by its good offices, aid the Haitian Government in the proper and efficient development of its agricultural, mineral and commercial resources and in the establishment of the finances of Haiti on a firm and solid basis.

¹¹ *Ibid.*, 1916, pp. 328-332; *Hearings*, pp. 204-207; 71st Cong., 2nd Sess., H. R. Rept. No. 39, pp. 3-5; U. S. T. S., No. 623; *Treaties, Conventions, etc.*, 1920, 1923, p. 2673.

¹² French text not here reprinted. The French text was corrected to the English by a protocol signed August 24, 1916. U. S. *For. Rel.*, 1916, p. 337.

ART. II. The President of Haiti shall appoint, upon nomination by the President of the United States, a general receiver and such aids and employees as may be necessary, who shall collect, receive and apply all customs duties on imports and exports accruing at the several customhouses and ports of entry of the Republic of Haiti.

The President of Haiti shall appoint, upon nomination by the President of the United States, a financial adviser, who shall be an officer attached to the ministry of finance, to give effect to whose proposals and labors the minister will lend efficient aid. The financial adviser shall devise an adequate system of public accounting, aid in increasing the revenues and adjusting them to the expenses, inquire into the validity of the debts of the republic, enlighten both Governments with reference to all eventual debts, recommend improved methods of collecting and applying the revenues, and make such other recommendations to the minister of finance as may be deemed necessary for the welfare and prosperity of Haiti.¹³

ART. III. The Government of the Republic of Haiti will provide by law or appropriate decrees for the payment of all customs duties to the general receiver, and will extend to the receivership, and to the financial adviser, all needful aid and full protection in the execution of the powers conferred and duties imposed herein; and the United States on its part will extend like aid and protection.

ART. IV. Upon the appointment of the financial adviser, the Government of the Republic of Haiti, in cooperation with the financial adviser, shall collate, classify, arrange and make full statement of all the debts of the republic, the amounts, character, maturity and condition thereof, and the interest accruing and the sinking fund requisite to their final discharge.

ART. V. All sums collected and received by the general receiver shall be applied, first, to the payment of the salaries and allowances of the general receiver, his assistants and employees and expenses of the receivership, including the salary and expenses of the financial adviser, which salaries will be determined by previous agreement; second, to the interest and sinking fund of the public debt of the Republic of Haiti; and, third, to the maintenance of the constabulary referred to in Article X, and then the remainder to the Haitian Government for purposes of current expenses.

In making these applications the general receiver will proceed to pay salaries and allowances monthly and expenses as they arise, and on the first of each calendar month, will set aside in a separate fund the quantum of the collection and receipts of the previous month.

ART. VI. The expenses of the receivership, including salaries and allow-

¹³ An agreement was signed at Washington June 27, 1916, between the secretary of state of the United States and Haitian commissioners which established the compensation of the financial adviser, the general receiver of customs and the deputy general receiver of customs. *U. S. For. Rel.*, 1916, p. 332.

ances of the general receiver, his assistants and employees, and the salary and expenses of the financial adviser, shall not exceed five per centum of the collections and receipts from customs duties, unless by agreement by the two Governments.

ART. VII. The general receiver shall make monthly reports of all collections, receipts and disbursements to the appropriate officer of the Republic of Haiti and to the department of state of the United States, which reports shall be open to inspection and verification at all times by the appropriate authorities of each of the said Governments.

ART. VIII. The Republic of Haiti shall not increase its public debt except by previous agreement with the President of the United States, and shall not contract any debt or assume any financial obligation unless the ordinary revenues of the republic available for that purpose, after defraying the expenses of the Government, shall be adequate to pay the interest and provide a sinking fund for the final discharge of such debt.

ART. IX. The Republic of Haiti will not without a previous agreement with the President of the United States, modify the customs duties in a manner to reduce the revenues therefrom; and in order that the revenues of the republic may be adequate to meet the public debt and the expenses of the Government, to preserve tranquillity and to promote material prosperity, the Republic of Haiti will cooperate with the financial adviser in his recommendations for improvement in the methods of collecting and disbursing the revenues and for new sources of needed income.

ART. X. The Haitian Government obligates itself, for the preservation of domestic peace, the security of individual rights and full observance of the provisions of this treaty, to create without delay an efficient constabulary, urban and rural, composed of native Haitians. This constabulary shall be organized and officered by Americans, appointed by the President of Haiti, upon nomination by the President of the United States. The Haitian Government shall clothe these officers with the proper and necessary authority and uphold them in the performance of their functions. These officers will be replaced by Haitians as they, by examination, conducted under direction of a board to be selected by the senior American officer of this constabulary and in the presence of a representative of the Haitian Government, are found to be qualified to assume such duties. The constabulary herein provided for, shall, under the direction of the Haitian Government, have supervision and control of arms and ammunition; military supplies, and traffic therein, throughout the country. The high contracting parties agree that the stipulations in this article are necessary to prevent factional strife and disturbances.

ART. XI. The Government of Haiti agrees not to surrender any of the territory of the Republic of Haiti by sale, lease or otherwise, or jurisdiction

over such territory, to any foreign government or power, nor to enter into any treaty or contract with any foreign power or powers that will impair or tend to impair the independence of Haiti.

ART. XII. The Haitian Government agrees to execute with the United States a protocol for the settlement, by arbitration or otherwise, of all pending pecuniary claims of foreign corporations, companies, citizens or subjects against Haiti.

ART. XIII. The Republic of Haiti, being desirous to further the development of its natural resources, agrees to undertake and execute such measures as in the opinion of the high contracting parties may be necessary for the sanitation and public improvement of the republic, under the supervision and direction of an engineer or engineers, to be appointed by the President of Haiti upon nomination by the President of the United States, and authorized for that purpose by the Government of Haiti.¹⁴

ART. XIV. The high contracting parties shall have authority to take such steps as may be necessary to insure the complete attainment of any of the objects comprehended in this treaty; and, should the necessity occur, the United States will lend an efficient aid for the preservation of Haitian independence and the maintenance of a government adequate for the protection of life, property and individual liberty.

ART. XV. The present treaty shall be approved and ratified by the high contracting parties in conformity with their respective laws, and the ratifications thereof shall be exchanged in the City of Washington as soon as may be possible.

ART. XVI. The present treaty shall remain in full force and virtue for the term of ten years, to be counted from the day of exchange of ratifications, and further for another term of ten years if, for specific reasons presented by either of the high contracting parties, the purpose of this treaty has not been fully accomplished.

In faith whereof, the respective plenipotentiaries have signed the present convention in duplicate, in the English and French languages, and have thereunto affixed their seals.

Done at Port au Prince, Haiti, the 16th day of September in the year of our Lord one thousand nine hundred and fifteen.

ROBERT BEALE DAVIS, JR. [Seal]
Chargé d'Affaires of the United States
LOUIS BORNO [Seal]
Secrétaire d'État des Relations Extérieures
et de l'Instruction Publique

¹⁴ An agreement was signed at Washington June 27, 1916, between the secretary of state of the United States and Haitian commissioners which established the compensation of the engineer or engineers. *U. S. For. Rel.*, 1916, p. 333.

And whereas, the said treaty has been duly ratified on both parts, and the ratifications of the two Governments were exchanged in the City of Washington, on the third day of May, one thousand nine hundred and sixteen;

Now, therefore, be it known that I, Woodrow Wilson, President of the United States of America, have caused the said treaty to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this third day of May in the year of
[SEAL] our Lord one thousand nine hundred and sixteen, and of
the independence of the United States of America the one
hundred and fortieth.

WOODROW WILSON

By the President:

ROBERT LANSING

Secretary of State

THE SECRETARY OF THE NAVY TO ADMIRAL CAPERTON¹⁵

File No. 838.00/1370

NAVY DEPARTMENT

Washington, November 10, 1915

23109. Arrange with President Dartiguenave that he call a cabinet meeting before the session of Senate which will pass upon ratification of treaty and request that you be permitted to appear before that meeting to make a statement to President and to members of cabinet. On your own authority state the following before these officers:

I have the honor to inform the President of Haiti and the members of his cabinet that I am personally gratified that public sentiment continues favorable to the treaty, that there is a strong demand from all classes for immediate ratification, and that treaty will be ratified Thursday.

I am sure that you, gentlemen, will understand my sentiment in this matter and I am confident if the treaty fails of ratification that my Government has the intention to retain control in Haiti until the desired end is accomplished and that it will forthwith proceed to the complete pacification of Haiti so as to insure internal tranquillity necessary to such

¹⁵ U. S. For. Rel., 1915, p. 458.

development of the country and its industry as will afford relief to the starving populace now unemployed. Meanwhile the present Government will be supported in the effort to secure stable conditions and lasting peace in Haiti whereas those offering opposition can only expect such treatment as their conduct merits.

The United States Government is particularly anxious for immediate ratification by the present Senate of this treaty, which was drawn up with the full intention of employing as many Haitians as possible to aid in giving effect to its provisions, so that suffering may be relieved at the earliest possible date.

Rumors of bribery to defeat the treaty are rife but are not believed. However, should they prove true those who accept or give bribes will be vigorously prosecuted.

It is expected that you will be able to make this sufficiently clear to remove all opposition and to secure immediate ratification.

(Signed) DANIELS

§ 129. ARMED INTERVENTION WITHOUT WAR (*Continued*)

NOTE BY THE EDITOR

The treaty of 1915 expired May 3, 1936, its duration having been fixed in 1917 (see *United States Treaty Series*, No. 623-A) at twenty years. In an *Additional Protocol Relating to Non-Intervention*, signed December 23, 1936, the United States agreed with other American Republics to "declare inadmissible the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the Parties." Violations "shall give rise to mutual consultation with the object of . . . seeking methods of peaceful adjustment." (Article 1.) Article 2 calls for submission of questions of interpretation to methods of pacific settlement.¹

Acts of armed intervention without war are often motivated by political objects which transcend the legal reasons given when the intervention begins. Thus the Haitian intervention, begun for the protection of American lives and property, ended in a military occupation, the establishment of a Haitian Government favorable to American interests and creditors generally, and the creation of a treaty regime subjecting its finances, police, development of its natural resources, and in important respects its foreign relations, to control by the United States. Milton Offutt lists at least seventy

¹ U. S. T. S. No. 923. In addition to the United States and Haiti, other ratifying States were: Brazil, Chile, Colombia, Cuba, Dominican Republic, Ecuador, El Salvador, Honduras, Mexico, Nicaragua, and Venezuela (as of February 15, 1939).

instances in which military or naval forces of the United States were landed on foreign soil to protect American citizens abroad.² According to Hindmarsh, "Such operations have ranged from mere pursuit of marauding bands to extensive military occupation of territory by several thousand troops. Whether the measures used were taken to prevent impending injury or to secure reparation for wrongs already committed they were defended as a necessary ultimate means of enforcing international obligations. The use of military or naval force to seek redress for a specific grievance or to afford protection to endangered citizens may be regarded as a measure of reprisal."³ Hindmarsh lists the following examples of military occupation undertaken as measures of reprisal since 1895: British occupation of Corinto, Nicaragua (1895); French occupation of Mytilene, Turkey (1901); joint occupation of Mytilene, Turkey (1905); United States occupation of Vera Cruz, Mexico (1914); Allied occupation of Greek Islands (1915-1916), including a pacific blockade; French and Belgian occupation of the Ruhr, Germany (1923).⁴

In 1854, after a series of attacks on American lives and property in Nicaragua, including an assault on the United States Minister to Central America, the United States demanded reparation and apologies. When these were rejected, after notice had been given, the United States vessel *Cyane* twice bombarded the city of Greytown, with large destruction of property but no loss of life. The United States rejected claims of France, Bremen, and Nicaragua for property damage suffered by their nationals; but Great Britain, recognizing the validity of the measures taken by the United States, declined to press claims of her subjects. In 1868 the United States Court of Claims refused to grant a claim of a French national for property damage suffered in these bombardments, saying that such questions "are international political questions, which no court of this country in a case of this kind is authorized or empowered to decide."⁵ This case may be regarded as one of armed reprisal, limited to the redress of specific grievances. No military occupation followed.

In 1923 the Italian fleet bombarded and occupied Corfu, a Greek island, killing civilians and taking control of police, customs, telegraphic and telephone and postal services in the city of Corfu. These acts were in reprisal for the killing of the Italian General Tellini, President of the Commission for the Delimitation of the Albanian frontiers, and members of his party, while in Greek territory, in circumstances which (in the view of Italy) established the complicity of the Greek Government. The reprisals took

² *Protection of Citizens Abroad by the Armed Forces of the United States* (1928), Chaps. II-IV.

³ *Force in Peace* (1933), p. 75.

⁴ *Ibid.*, p. 77.

⁵ *Perrin v. United States*, 4 Ct. Cl. 543, 547.

place after Greece had refused to comply with certain demands in an Italian ultimatum. Italy contended that no warlike purpose was intended. These acts could have been considered legal armed reprisals had not Italy and Greece been Members of the League of Nations. After the bombardment and occupation, Greece appealed to the League of Nations, which referred the question to the Conference of Ambassadors (representatives of the Principal Allied and Associated Powers in the World War). The conference decided that, since Greece had not complied with certain conditions the Conference had set forth, it must pay the whole indemnity claimed by Italy of fifty million lire. Subsequently Corfu was evacuated. The decision of the Conference was widely criticized, since both Italy and Greece were Members of the League, bound by Articles 12-15 of the Covenant. A Committee of Jurists, appointed subsequently to consider questions involved in the Corfu transactions, was required to answer the question: "Are measures of coercion which are not meant to constitute acts of war consistent with the terms of Articles 12 to 15 of the Covenant when they are taken by one Member of the League . . . against another Member . . . without prior recourse to the procedure laid down in those articles?" The Committee answered in the following ambiguous terms: "Coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 . . . and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures."⁶ This reply was adopted by the Assembly, but dissatisfaction among League Members continued. In 1925 the Council adopted a Report of a League Commission of Enquiry on the occupation by Greek troops of Bulgarian territory, which was much more explicit and in conformity with what were widely supposed to be League principles: "We believe that all the Members of the Council will share our view in favor of the broad principle that where territory is violated without sufficient cause reparation is due, even if at the time of the occurrence it was believed by the party committing the act of violation that circumstances justified the action."⁷ Although Greece had argued that it had no aggressive or warlike design, the Council decided that it should pay Bulgaria compensation for loss of life and property, and also reparation for moral and material damage.

Extreme examples of the use of armed intervention without war are afforded by the German annexations of Austria (1938) and Czechoslovakia (1939), and the Italian annexation of Albania (1939). They are extreme

⁶ League of Nations *Official Journal*, 1924, p. 524.

⁷ *Ibid.*, 1926, p. 173.

in the first two cases because the scope of the measures taken seemed, in the absence of an arbitrator, so out of proportion to the legal reasons (mainly persecution of German populations) advanced. In the case of Albania apparently no legal reasons whatever were put forward; the use of force to secure the annexation was excused by Italy on political grounds alone.

§ 130. SELF-DEFENSE: JAPANESE ARGUMENT CONCERNING MANCHUKUO, 1933

The train of events leading to the occupation of Manchuria by Japanese troops was immediately begun by an incident which occurred on the night of September 18, 1931. The Chinese Government's description of this incident in its appeal to the Council of the League of Nations September 21, 1931, related that "beginning from ten o'clock on the night of September 18, regular troops of Japanese soldiers, without provocation of any kind, opened rifle and artillery fire upon Chinese soldiers at or near the city of Mukden, bombarded the arsenal and barracks . . . set fire to the ammunition depot" and "disarmed the Chinese troops in Changchun, Kwanchengtze, and other places." *Official Journal*, December, 1931, p. 2453.

The Japanese version of the incident, communicated to the Council on September 26, was substantially as follows: "A patrol of seven men under a lieutenant were making reconnaissances in the railway zone north of Mukden when they heard behind them, about 10:30 P. M., a violent explosion. They turned about and some 500 meters northwards, near the place at which the explosion had occurred, they perceived Chinese soldiers in flight. The patrol at first pursued them, but found themselves under fire from soldiers under cover and then from a force of some 400 or 500 Chinese troops. The Japanese company commander promptly came up with 120 men, pursued the Chinese troops and occupied part of the Mukden North Barracks." *Document C. 621.1931; Official Journal*, December 1931, p. 2478: as summarized in Hudson, *Verdict of the League*, p. 26n.

The Lytton Report, adopted by the Assembly of the League February 24, 1933, covered the whole ground of the dispute between Japan and China. Japan, basing herself upon the version of the events of September 18 given above, pled that she acted in self-defense. This argument is reproduced below. This material forms part of the Japanese comment upon the Lytton Report before its adoption by the Assembly; and the part of the Lytton Report against which it is particularly directed reads as follows:

"Without excluding the possibility that, on the night of September 18-19, 1931, the Japanese officers on the spot may have believed that they were acting in self-defense, the Assembly cannot regard as measures of self-defense the military operations carried out on that night by the Japanese troops at Mukden and other places in Manchuria. Nor can the military measures of Japan as a whole, developed in the course of the dispute, be regarded as measures of self-defense. Moreover, the adoption of measures of self-defense does not exempt a state from complying with the provisions of Article 12 of the Covenant." Section 9 of Part III of the Report, as printed in Hudson, *Verdict of the League*, p. 70.

Inasmuch as the Members of the Assembly voted unanimously to accept this Report (with the exception of Siam, which abstained from voting, and Japan) it seems fairly clear that the members of the international community did not regard the measures of Japan as legitimate measures of self-defense, as they understood the principles of international law. Japan understood these principles differently, and argued cogently that each State must judge for itself what measures of self-defense are necessary in any given situation.

Because Japan's argument of self-defense is that of all States which use force to obtain redress on their own construction of the law, it seems significant enough to be printed below.

The Incident of September 18 and Subsequent Operations

The Manchurian Question, Japan's Case in the Sino-Japanese Disputes as Presented before the League of Nations. Japanese Delegation to the League of Nations, Geneva, 1933, pp. 37-44.

The Japanese military authorities have furnished the Commission, both in writing and in conversations with the headquarters staff of the Kwantung Army, with complete and detailed information regarding the various phases of this incident. This information is considered by the Japanese Government an accurate and truthful account, and they must sustain it in its integrity.

The Report sums up this information in six paragraphs entitled "the Japanese version" (page 67). From this summary, many not unimportant details are omitted. Accordingly, Members of the Council who wish for further information, are referred to the accounts supplied by the principal actors themselves and inserted in the documents presented by the Japanese Government.

After summing up also "the Chinese version," the Report formulates certain conclusions which cannot but cause surprise, as they are not the logical consequence of the two versions which precede them, and appear, as the Report admits, to be especially influenced by information drawn from other and unofficial sources.

The Commission recognise (page 71) the fact of the explosion, but they add that the damage done was not of itself "sufficient to justify military action." Here they fail to take into account two other factors, which they nevertheless admit to have existed—viz., the state of acute tension already existing between the conflicting military forces and the existence of an emergency plan of campaign, which the Japanese Army, like any other organised force, must necessarily prepare whenever it is stationed on or in the neighbourhood of foreign territory, particularly when repeated occurrences show that prompt measures may become imperative.

This state of acute tension, admitted by the Report to have existed—general and growing tension between China and Japan, and local tension between the military forces in close contact—is, as has already been observed, insufficiently brought out in the Report.

As respects the assertion that the Japanese had "a carefully prepared plan to meet the case of possible hostilities between themselves and the Chinese" (page 71), it is only necessary to look for a moment at the facts to be convinced that no other Power or its armed forces could possibly have acted otherwise.

The Japanese Army in Manchuria before September 18th, in view of its much inferior strength, faced, as it was, by very superior forces provided with a vast supply of material, including aeroplanes, reserve munitions and a great arsenal, naturally had to provide for the event of some occurrence, or a Chinese attack, obliging it to take immediate steps to prevent itself from being overwhelmed by a more numerous adversary. That the Japanese Army had its plans for dealing with such a situation is undoubtedly the case, and it would have been a gross dereliction of duty if it had not. Every possible combination had been minutely worked out; frequent manoeuvres helped to make the execution of the plan almost automatic. And although a certain amount of initiative had to be left to those who were on the spot in any given conjuncture, the main objectives in case of any attack were foreseen and well known. It was therefore perfectly natural that, after the explosion on the railway line and the firing of the first shots—all the work of Chinese soldiery—the plan was "put into operation with swiftness and precision" (page 71).

The Report draws a contrast between the preparation of this emergency plan, a legitimate and necessary measure of security, and the absence on the Chinese side of any plan "of attacking the Japanese troops, or of endangering the lives or property of Japanese nationals at this particular time or place" (page 71). It relies, in support of this attitude, on a telegram supposed to have been sent on September 6th by General Chang Hseuh-liang, instructing the Chinese forces to exercise patience and avoid having recourse to force. Supposing—though the Japanese have no knowledge on the point—that such a telegram was in fact despatched, received and circulated, and, further, that these orders were not subsequently cancelled or modified by General Chang Hseuh-liang himself, the telegram in itself could not, in the notorious state of indiscipline of a Chinese army, give any guarantee that the Chinese would never have attacked the Japanese, nor could it furnish any decisive proof that they did not make the attack of September 18th. And it is to be remarked that, in point of fact, the Chinese troops did attack on that night and continued to resist by force of arms. The Commission's statement that "the Chinese made no *concerted* or *authorised* attack on the Japanese forces" shows that they do not discard the hypothesis of a Chinese attack, but would limit its bearing on the case by refusing to call it "concerted" or "authorised." According to the Report,

the attack might be the work of soldiery acting on their own initiative and without orders from their superiors.

But, in any event, there remains the solid fact that the explosion did take place, and that an attack was launched by Chinese soldiers; in consequence, the Japanese emergency plan was automatically put in motion long before such question as the extent of the damage could ever be discussed.

In dealing with the events of the night of September 18th, the Commission have thought it their duty further to add that "the military operations of the Japanese troops during this night . . . cannot be regarded as measures of legitimate self-defense" (page 71).

It is entirely impossible to accept this opinion, which must be a surprising one to anyone belonging to those countries which are parties to the Briand-Kellogg Treaty for the outlawry of war.

The paragraph concerning the right of self-defence contained in the Identic Note of Mr. Kellogg, Secretary of State, dated June 23rd, reads:

"(1) *Self-defence.*—There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defence. *That right is inherent in every sovereign State and is implicit in every treaty.* Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defence."

The resolution adopted by the Senate of the United States at the time of ratification of that Treaty states:

"It is well understood that the exercise of the right of self-protection may, and frequently does, extend in its effect *beyond the limits of the territorial jurisdiction of the States exercising it.*"

The letters of Sir Austen Chamberlain to the American diplomatic representatives in London, dated May 19th and July 18th, 1928, may also be cited:

The first observes:

"4. After studying the wording of Article 1 of the United States draft, His Majesty's Government do not think that its terms exclude action which a State may be forced to take in self-defence. Mr. Kellogg has made it clear in the speech to which I have referred above that he regards the right of self-defence as inalienable, and His Majesty's Government are disposed to think that on this question no addition to the text is necessary. . . .

"10. The language of Article 1, as to the renunciation of war as an instrument of national policy, renders it desirable that I should remind Your Excellency that there are *certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace*

and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defence. It must be clearly understood that His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect. The Government of the United States have comparable interests any disregard of which by a Foreign Power they have declared that they would regard as an unfriendly act. His Majesty's Government believe, therefore, that, in defining their position, they are expressing the intention and meaning of the United States Government."

The second says:

"I am entirely in accord with the views expressed by Mr. Kellogg in his speech of April 28th, that *the proposed treaty does not restrict or impair in any way the right of self-defence*, as also with his opinion that *each State alone is competent to decide* when circumstances necessitate recourse to war for that purpose."

The French Government, in their reply of July 14th, 1928, to the American Ambassador in Paris, similarly remarked:

"Rien dans le nouveau Traité ne restreint ni ne compromet d'une façon quelconque le droit de défense personnelle. Chaque nation à cet égard reste toujours libre de défendre son territoire contre une attaque ou une invasion; seule, elle est compétente pour décider si les circonstances exigent de recourir à la guerre pour sa propre défense."

The German Government, in their letter of April 27th, 1928 to the American Ambassador in Berlin, also declare that they start with the presumption that the proposed treaty "would not put in question the sovereign right of any State to defend itself."

The Japanese Government, informed of all these communications, also did not fail to emphasise, in their note of May 26th, 1928, to the American Ambassador, that "the proposal of the United States is understood to contain nothing that would refuse to independent States the right of self-defence."

In the face of these express reserves, the right to pronounce a decisive opinion on an act of self-defence falls solely within the sovereign appreciation of the interested State. And on this point the finding of the Commission explicitly is that "the Commission does not exclude the hypothesis that the officers on the spot may have thought they were acting in self-defence" (page 71). In the case of this incident of September 18th, no one except the officers on the spot could possibly be qualified to judge whether or not the action undertaken by the Japanese Army was a measure of self-defence.

It is unnecessary here to enlarge on the nature of the right of self-

defence. It has never been better defined than by Daniel Webster when, as Secretary of State of the American Republic, he laid down that it demanded for its just exercise a case of "necessity, instant and overwhelming, allowing no choice of means and no instant for deliberation." With those conditions the Incident of September 18th precisely complies. There was the necessity of meeting a great and imminent danger—an overt attack by members of a vastly superior force, capable, if not nipped in the bud, of driving the Japanese into the sea. There was no choice of means. What else was to be done? There was no instant for deliberation—the open attack was launched upon them. It is fortunately unnecessary to consider whether the magnitude of the interests at stake warranted forcible measures. For these interests were nothing less than the whole position of Japan in the Far East.

It is as impossible as it would be unjust to make Japan responsible for the further events which supervened on the Chinese resistance. Measures of self-protection usually meet no resistance and are at once settled by amicable discussion between the Governments concerned. If, however, they are not met by armed opposition, there is no knowing how far they may develop, and necessarily so.

It may not be inappropriate to recall the case of *Navarino*, where a conflict was so little desired or expected that one of the Governments involved described it as an "untoward event." The Egyptian armament had come to assist the Turks to suppress the revolt in Greece. They were faced by a fleet of English, French and Russians, who were bent on preventing them from doing so. In that state of tension, a chance shot furnished the spark that produced the conflict. The result destroyed the Egyptian fleet and Turkish hopes, and set the seal on the independence of Greece. Yet it began in mere self-defence—the return of fire. This illustrates how impossible it is to limit the consequences of self-defensive measures.

The Commission, while drawing attention to the synchronisation of the operations which took place on September 18th throughout the entire extent of the South Manchuria Railway zone, omit to notice the necessity for such simultaneous action. There was no other alternative for the Japanese commander, with his 10,400 troops stationed all along an eleven-hundred-kilometre line of railway, and faced by 220,000 Chinese troops (without reckoning 110,000 beyond the Great Wall, also under General Chang Hseuh-liang's command). At Mukden itself, a single Japanese regiment of reduced strength together with a few railway patrols, 1,500 men in all, were faced by 15,000 Chinese with some forty guns; and a similar situation existed at Changchung and elsewhere. The Japanese Commander-in-Chief was, in fact, responsible for the protection of over a

million Japanese subjects residing in Manchuria. In case of an attack at one point, and with the evident possibility before him of attacks at other points, the only possible way of assuring that protection was to use all the transport facilities that the railway afforded, and to take the Chinese troops by surprise before they could have time to move.

To sum up, the operations which commenced on the night of September 18th were only the putting into active execution of a plan prepared to meet the case of a Chinese attack, and whose prompt and accurate execution had always been considered by the Commander-in-Chief as absolutely essential for the fulfilment of the task of protection which was incumbent on him, in view of the great local superiority of the Chinese. These operations had no relation to anything but self-defence, and the Japanese Government cannot allow either their necessity or their appropriateness to be the subject of dispute.

The Report relates at considerable length the ensuing operations undertaken subsequently to September 18th with a view to effectively ensuring the safety of Japanese life and property. The Japanese Government will not here enter into the numerous points of detail on which observations would have to be made. They are conscious of never having transgressed the due limits of the rights of self-defence.

§ 131. LIMITATION OF EMPLOYMENT OF FORCE IN THE COLLECTION OF CONTRACT DEBTS

The Hague Convention here printed is an important treaty limitation on the purposes for which States may resort to armed force.

Convention (II) Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts¹

SIGNED AT THE HAGUE, OCTOBER 18, 1907

English text from J. B. Scott, *Hague Conventions and Declarations of 1899 and 1907* (1915), pp. 89 ff.

[Names of signatories, preamble, and names of plenipotentiaries omitted.]

¹ For ratifications, see Table, § 123. The act of ratification of the United States contains the following reservation: "That the United States approves this Convention with the understanding that recourse to the Permanent Court for the settlement of the differences referred to in said Convention can be had only by agreement thereto through general or special treaties of arbitration heretofore or hereafter concluded between the parties in dispute."

Nicaragua ratified under a reservation similar in substance to those made by Argentina (at signature), Guatemala, and El Salvador. Nicaragua's reservation (at adhesion): "(a) With regard to debts arising from ordinary contracts between the citizen or subject of a nation and a foreign Government, recourse shall be had to arbitration only in the specific case of a denial of justice by the courts of the country where the contract was made, the remedies

ARTICLE 1. The contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals.

This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award.

ARTICLE 2. It is further agreed that the arbitration mentioned in paragraph 2 of the foregoing article shall be subject to the procedure laid down in Part IV, Chapter III, of the Hague Convention for the pacific settlement of international disputes. The award shall determine, except where otherwise agreed between the parties, the validity of the claim, the amount of the debt, and the time and mode of payment.

[Articles 3-7, dealing with ratifications, adhesions, and so on, and the signatures, are omitted.]

§ 132. CALVO AND DRAGO DOCTRINES

NOTE BY THE EDITOR

Hague Convention (II) of 1907 sets forth in treaty form a doctrine long advocated by the Argentine statesman, Señor Drago, to the effect that armed force should not be used in the collection of public debts, usually known as the "Drago doctrine."¹ The so-called "Calvo doctrine" is broader. It condemns all state intervention, diplomatic as well as armed, for the purpose of enforcing private claims of a pecuniary nature against another State, including contract claims, and claims based on civil war, insurrection, and mob violence. Calvo contended that state interposition or intervention for such purposes favored more powerful States and established an unjustifiable discrimination as between nationals and foreigners.²

§ 133. SANCTIONS UNDER THE LEAGUE COVENANT

When Members of the League of Nations voted that Italy was the aggressor in its conflict with Ethiopia, the first occasion for the application of the sanctions provided for in Article 16 of the League Covenant (§ 115) arose.

before which courts must first have been exhausted. (b) Public Loans secured by bond issues and constituting the national debt shall in no case give rise to military aggression or the material occupation of the soil of American nations." Scott, *Hague Conventions and Declarations of 1899 and 1907*, p. 94.—Ed.

¹ See L. Drago, "State Loans," in 1 *A.J.I.L.* (1907), 692.

² See C. Calvo, *Le droit international théorique et pratique*, III, § 1280; A. S. Hershey, "The Calvo and Drago Doctrines," 1 *A.J.I.L.* (1907), 26; T. S. Woolsey in 15 *A.J.I.L.* (1921), 558; and materials in Chapter VIII above.

While the sanctions under this article had been widely discussed by persons interested in the League, the public generally was unaware that League organs had attempted to work out in advance the methods by which this new weapon would be applied, and the consequences to which its application would lead.

Two documents embodying the results of this work are printed below. The first (§ 134) is a series of Resolutions adopted by the Assembly of the League in 1921, setting forth certain important general principles with respect to the application of Article 16. The second (§ 135) is the Report of the Secretary General of the League on the legal position arising from the enforcement in time of peace of the economic measures indicated in Article 16. The Report is dated May 17, 1927, and was given in response to a question directed to the Secretary General by the League Council.

A third document (§ 136) which is really a series of documents, comprises the texts of the Proposals voted against Italy in the first case in which the Members of the League applied the provisions of Article 16.

A fourth document (§ 137) is the text of the resolution terminating the application of sanctions.

Article 16, Covenant of the League of Nations

See § 115, above, at page 565.

§ 134. SANCTIONS UNDER THE LEAGUE COVENANT (Continued)

Resolutions Concerning the Economic Weapon

Adopted by the Second Assembly of the League of Nations, October 4, 1921

Publications of the League of Nations, V. Legal. 1927. V. 14. Pp. 42-43.

The Assembly adopts the following resolutions:

1. The resolutions and the proposals for amendments to Article 16 which have been adopted by the Assembly shall, so long as the amendments have not been put in force in the form required by the Covenant, constitute rules for guidance which the Assembly recommends, as a provisional measure, to the Council and to the Members of the League in connection with the application of Article 16.

2. Subject to the special provisions of Article 17, the economic measures referred to in Article 16 shall be applicable only in the specific case referred to in this article.

3. The unilateral action of the defaulting State cannot create a state of war: it merely entitles the other Members of the League to resort to acts of war or to declare themselves in a state of war with the Covenant-breaking State; but it is in accordance with the spirit of the Covenant that the League of Nations should attempt, at least at the outset, to avoid war, and to restore peace by economic pressure.

4. It is the duty of each Member of the League to decide for itself whether a breach of the Covenant has been committed. The fulfilment of their duties under Article 16 is required from Members of the League by the express terms of the Covenant, and they cannot neglect them without breach of their Treaty obligations.

5. All cases of breach of Covenant under Article 16 shall be referred to the Council as a matter of urgency at the request of any Member of the League. Further, if a breach of Covenant be committed, or if there arise a danger of such breach being committed, the Secretary General shall at once give notice thereof to all the Members of the Council. Upon receipt of such a request by a Member of the League, or of such a notice by the Secretary-General, the Council will meet as soon as possible. The Council shall summon representatives of the parties to the conflict and of all States which are neighbors of the defaulting State, or which normally maintain close economic relations with it, or whose cooperation would be especially valuable for the application of Article 16.

6. If the Council is of opinion that a State has been guilty of a breach of Covenant, the Minutes of the meeting at which that opinion is arrived at shall be immediately sent to all Members of the League, accompanied by a statement of reasons and by an invitation to take action accordingly. The fullest publicity shall be given to this decision.

7. For the purpose of assisting it to enforce Article 16, the Council may, if it thinks fit, be assisted by a *technical* Committee. This Committee, which will remain in permanent session as soon as the action decided on is taken, may include, if desirable, representatives of the States specially affected.

8. The Council shall recommend the date on which the enforcement of economic pressure, under Article 16, is to be begun, and shall give notice of that date to all the Members of the League.

9. All States must be treated alike as regards the application of the measures of economic pressure, with the following reservations:

(a) It may be necessary to recommend the execution of special measures by certain States.

(b) If it is thought desirable to postpone, wholly or partially, in the case of certain States, the effective application of the economic sanctions laid down in Article 16, such postponement shall not be permitted except in so far as it is desirable for the success of the common plan of action, or reduces to a minimum the losses and embarrassments which may be entailed in the case of certain Members of the League by the application of the sanctions.

10. It is not possible to decide beforehand, and in detail, the various

measures of an economic, commercial and financial nature to be taken in each case where economic pressure is to be applied.

When the case arises, the Council shall recommend to the Members of the League a plan for joint action.

11. The interruption of diplomatic relations may, in the first place, be limited to the withdrawal of the heads of Missions.

12. Consular relations may possibly be maintained.

13. For the purposes of the severance of relations between persons belonging to the Covenant-breaking State and persons belonging to other States Members of the League, the test shall be residence and not nationality.

14. In cases of prolonged application of economic pressure, measures of increasing stringency may be taken. The cutting-off of the food supplies of the civil population of the defaulting State shall be regarded as an extremely drastic measure which shall only be applied if the other measures available are clearly inadequate.

15. Correspondence and all other methods of communication shall be subjected to special regulations.

16. Humanitarian relations shall be continued.

17. Efforts should be made to arrive at arrangements which would ensure the cooperation of States non-Members of the League in the measures to be taken.

18. In special circumstances and in support of economic measures to be taken, it may become advisable: (a) to establish an effective blockade of the seaboard of the Covenant-breaking State; (b) to entrust to some Members of the League the execution of the blockade operations.

19. The Council shall urge upon all the States Members of the League, that their Governments should take the necessary preparatory measures, above all of a legislative character, to enable them to enforce at short notice the necessary measures of economic pressure.

§ 135. SANCTIONS UNDER THE LEAGUE COVENANT (Continued)

Report by the Secretary-General on the Legal Position Arising from the Enforcement in Time of Peace of the Measures of Economic Pressure Indicated in Article 16 of the Covenant, May 17, 1927

Publications of the League of Nations, V. Legal. 1927. V. 14. Pp. 83-88.

By a decision of December 8th, 1926, the Council has directed the Secretariat to report upon the question of "the legal position which would be brought about by enforcing in time of peace the measures of economic

pressure indicated in Article 16 of the Covenant, particularly by a maritime blockade."

For the purpose of this report it is not necessary to discuss what may be the full extent of the legal obligations resting on Members of the League as regards taking measures to apply the sanctions. It is sufficient to note that, by the resolutions adopted by the Assembly on October 4th, 1921, the Members of the League expressed the view that each Member is competent to decide for itself whether sanctions have become applicable under Article 16 but is under the duty of deciding this question with scrupulous regard to its obligations under the Covenant (Resolution 4), and that the action to be taken can conveniently be suggested and regulated by the Council (Resolutions *passim*). In the present report it is assumed that any application of the article would in fact be preceded and controlled by recommendations of the Council and that it would be a misapplication of the article, which would not be tolerated, if a Member or group of Members should claim to act under it on their own account in defiance of the general sentiment of the League.

The question asked by the Council may be formulated in greater detail as the question how far it is possible for the Members of the League, other than the State attacked by the Covenant-breaking State, to apply, without resort to war, the economic sanctions contemplated by Article 16, more particularly by way of a maritime blockade, without violating rights belonging under international law to:

- (a) The Covenant-breaking State itself;
- (b) Other Members of the League;
- (c) Third States.

The question how far the sanctions can lawfully be carried without resort to war is considered below with reference to each of the above classes of State. It may be noted here that, from the legal point of view, the existence of a state of war between two States depends upon their intention and not upon the nature of their acts. Accordingly, measures of coercion, however drastic, which are not intended to create and are not regarded by the State to which they are applied as creating a state of war, do not legally establish a relation of war between the States concerned. This would seem to be the case even if, as is suggested to be possible under point (c) below, third States find it necessary to guide their own conduct by the view that a state of war exists. There is no general rule of international law under which application of the economic sanctions would automatically produce a state of war.

With these observations, we may turn to consider the three cases distinguished at (a), (b) and (c).

(a) *Position as between the Members Applying the Sanctions and the Covenant-breaking State.*

The Covenant-breaking State may be a Member of the League to which Article 16 is directly applicable or a non-Member to which it is applicable under the terms of Article 17. The article might be applicable to a non-Member on at least the following two grounds:

(1) Because, having accepted the obligations of membership for the purposes of a dispute with a Member or with a non-Member which has accepted such obligations, it has resorted to war with its adversary contrary to the provisions of Articles 12, 13 or 15 (Article 17, paragraph 1);

(2) Because it refused to accept the obligations of membership for the purposes of a dispute with a Member of the League and resorted to war with that Member (Article 17, paragraph 3).

There is a difference between the position of a Covenant-breaking State which is a Member of the League or has accepted the obligations of membership so as to make Articles 12 to 16 applicable and that of a non-Member which has not accepted those obligations. The former has agreed in advance that the action which it takes is to be deemed an act of war against the Members of the League which it does not actually attack and is to result in the application of the sanctions of Article 16. The latter is merely acting with full knowledge that those Members have agreed among themselves to regard its conduct as an act of war and apply the sanctions.

In both cases, however, the Members of the League which are not attacked, if they in full conscience consider that Article 16 is applicable, are bound by their obligations to the State attacked and to one another to regard the aggressor State as having committed an act of war against themselves and as liable to the sanctions. It would not seem, therefore, that the above-noted distinction could result, from the point of view of the Members of the League, in any difference in the measures to be taken against the aggressor State, or that the lawfulness of taking in the second case any measures which could lawfully be taken in the first case could be disputed without denying the lawfulness of Article 17, paragraph 3, of the Covenant. International law, however, does not regard as illegal the conclusion or the application of treaties of defensive alliance which involve resort to war by all the parties against the State which attacks one of their number. It would seem *a fortiori* that no illegality is committed against the aggressor State by agreeing to support the State attacked

by measures falling short of resort to war or by actually employing such measures. It may be added that the provisions of the Covenant can claim a higher justification than any ordinary treaty of defensive alliance, since they constitute obligations mutually assumed towards one another by the great majority of States for the sole purpose of enforcing the pacific settlement of international disputes.

If the view taken in the preceding paragraph is correct, it would follow that the aggressor State has no legal right to demand that the Members of the League shall formally resort to war with it before taking any particular kind of economic measures contemplated by Article 16. A reservation should doubtless be made as regards treaty stipulations and rules of law which are applicable even in time of war, but, subject to this, it is difficult to argue that the action to be taken under the article must conform to legal limitations arising from rights of the aggressor State, whether under treaty or otherwise. It may be argued, on the other hand, that the aggressor State, unless it is a non-Member State which has not accepted the obligations of the Covenant, is under a legal obligation to regard any application of the sanctions of Article 16, however severe, which is made without resort to war as consistent with the maintenance of a state of peace between it and the Members of the League applying the sanctions. This argument is based on the consideration that the aggressor State has agreed that such a breach of the Covenant as it has committed shall result in the application of the sanctions to it. The argument is, however, only of theoretical importance. It would merely establish that, in resorting to war against the Members applying sanctions, the aggressor would be committing an illegality additional to the original illegality of its resort to war with the State which it has attacked. The fact, however, that a war has been illegally commenced does not in the present state of international law affect the rights of the belligerent as such. Accordingly, the question of observing limitations in the measures taken appears to be one of policy and not of law. If they are confined within narrow limits, the chances that the aggressor State will not regard them as a *casus belli* will no doubt be increased. It is, however, clear that an act which in itself would not normally lead to active hostilities between two States changes its character when it is performed as part of concerted action by a number of States against a belligerent. It is also clear that the attitude of the aggressor State will ultimately be dictated not by legal considerations but by its judgment as to its own interests. There is, in fact, no means of preventing the aggressor State from making any measures in application of Article 16 the occasion of a resort to war against the States which apply them. The Members of the League, or some of them, might still maintain, as a matter of policy, the attitude of refusing for their part to consider

themselves formally at war with the aggressor State. Their attitude would obviously be dictated by the course of events, the necessities of self-defense and the requirements of their common policy.

(b) *Position as Regards Members of the League Themselves.*

It is necessary, at least in theory, to distinguish between the case of a Member which is applying the sanctions and that of a Member which does not consider Article 16 to have become applicable.

It would seem that the article places upon the Member of the League which considers the *casus foederis* to have arisen not merely the obligation to take action itself but also the obligation to recognise the lawfulness of measures of economic pressure taken within the terms of the article by other Members of the League, notwithstanding that they injure its interests and violate rights for which ordinarily it would be entitled to claim respect. In particular, under the article as originally drafted and still in force, the Members have expressly agreed that the States applying sanctions are to ensure "prevention of all financial, commercial or personal intercourse between the nationals of the Covenant-breaking State and the nationals of any other State whether a Member of the League or not" (paragraph 1). At the same time, they have contracted "mutually to support one another in the financial and economic measures which are taken under this article, in order to minimise the loss and inconvenience resulting from the above measures" (paragraph 3).

These provisions suffice to negate any right of an individual Member applying the sanctions to claim that it alone is entitled to interrupt relations between its own nationals and the Covenant-breaking State or to determine the degree of such interruption; they oblige it to submit to such interruption at the hands of the other Members to the full extent contemplated by the article.

Despite the intervention of the Council which is assumed to have taken place (see the second paragraph of this report), and although it may be hoped that the case will not occur, it is theoretically possible that a Member might refuse to participate in the sanctions on the ground that it did not consider the *casus foederis* to have arisen. Does it thereby become entitled to be treated on the same footing as the "third States" whose case is considered at (c) below? It may be argued that a Member is not bound to regard other Members as entitled to apply Article 16 unless it itself considers the Covenant to have been violated. This contention is thought to be ill-founded. Although the matter is not free from doubt, the better view appears to be that the Member, while entitled to decide for itself if there has been a breach of the Covenant which justifies and obliges it to apply Article 16, is bound as a party to the article to recognize the right

of the other Members to hold for their part that there has been a breach of the Covenant and to interrupt intercourse between the peccant State and the nationals and territory of all other States, including those of the Member itself. If this view is correct, however, the Member refusing to apply the sanctions is exposed to losses without being entitled to the assistance of the other Members under the above-quoted provision of paragraph 3 of the article, and it incurs the risk that, in performing its legal duty of acquiescing in measures affecting its nationals and territory, it may incur the hostility of the Covenant-breaking State. Its position is in fact one for which express provision is not made in Article 16, which appears to be inspired by the hope that the Members of the League will in fact be unanimous.

Although, as is pointed out under (c) below, the economic provisions of Article 16 represent the maximum action which the Members of the League would claim to take if they declared themselves at war with the Covenant-breaking State, the idea that a Member could be entitled to object to the full application of those provisions unless the state of war existed is not a necessary conclusion from the terms of the article and has not been approved in previous discussions of the subject by the competent organs of the League, but, on the contrary, appears to be irreconcilable with the unanimous opinion expressed by the Members of the League in the Assembly resolutions of 1921.

The conclusion is that strict application of the economic sanctions of the article without resort to war is possible without violating legal rights of the Members applying the sanctions or (probably) of Members which do not consider the Covenant to have been broken.

(c) *Position as Regards "Third States."*

By "third States" is meant States which are not parties to the aggression (resort to war) which provokes the sanctions and are not Members of the League. It is with regard to such States that the most delicate legal questions will arise in connection with the application of economic sanctions, particularly if they are applied without declaration of a state of war against the aggressor State.

A third State is not under any treaty obligation to acquiesce in the measures contemplated by Article 16 of the Covenant, and, on the principle: "*pacta tertiis neque nocent neque prosunt*," the coming into force of the Covenant could not in strict law affect *ipso facto* any rights which it possesses under general principles of international law and by treaty in respect to maintenance of intercourse between its nationals and territory and the aggressor State. Nor, on the other hand, should the Covenant be regarded as imposing on the Members of the League an obligation to

violate the rights of a third State. It is true that Article 16 places the third State's nationals and territory on the same footing as those of a Member of the League in the provisions (paragraph 1) which contemplate the absolute isolation of the aggressor from the rest of the world. A treaty must, however, be assumed to be intended to be interpreted subject to the rights of third States under international law. Furthermore, those provisions are part of the maximum action to be taken under the article, *i.e.*, form part of measures which include declaration of war and employment of armed forces against the aggressor State, and, applied in such circumstances, they may be regarded as representing the severest policy of economic pressure consistent with the laws of war. There is nothing in the article to render their strict application obligatory on Members of the League when their policy is to use measures of pressure falling short of formal resort to war.

It is therefore prudent to conclude that, in applying the economic sanctions of Article 16 without resort to war, the Members of the League must fully respect the rights of third States.

On the other hand, it must not be ignored that, in acting under Article 16, the Members of the League are not asserting or defending their own selfish interests but, at the cost of loss and inconvenience to themselves, are carrying out a treaty obligation designed to maintain the peace of the world by enforcing pacific settlement of international disputes; and that the success of the League in realising this policy of pacific settlement, and its success in enforcing it against States which refuse compliance, are matters in which the peaceful third State may itself be considered to have an interest. It is therefore unnecessary to assume that, when the occasion arises, third States will necessarily take the same view of their rights under international law as they might be expected to take in the case of a war, or of a resort to measures of economic pressure without declaration of war, by a State or groups of States pursuing their individual interests against another State or States. While it is not safe to rely in theory, and in advance of the event, upon this possibility, there must be held to be a possibility that third States, even if their active cooperation is not secured, may recognise such adaptation of the traditional rules of international law as experience may show to be necessary to render the application of Article 16 effective.

The considerations suggested in the preceding paragraph as entitling the Members of the League to hope that a benevolent attitude towards their policy may be adopted by third States are reinforced by the fact that, except in the case in which it is a non-Member of the League which has not accepted the obligations of the Covenant, the aggressor State, by its original resort to war, will have violated a treaty obligation and thereby

committed an illegal act, and the measures applied to it will be measures which it has agreed shall be applicable in such an event. These facts do not, however, modify the legal position of the third State, since a belligerent's rights towards neutrals do not depend upon the legality or illegality of its conduct in resorting to war.

Assuming that the third State will claim to the utmost all the rights which it can found upon international law as it existed before the Covenant, it is clearly impossible to say with certainty and in detail what measures would or would not be regarded by such State as violating their rights. The following propositions may, however, be ventured on the subject as a whole.

1. *Measures Taken by the Member of the League within Its Own Territory and in Regard to Its Own Nationals.*

(1) It would not seem that the third State would have a legal right to object to the Member of the League imposing upon nationals of the aggressor State, in so far as they were resident or carried on business within its territory, disabilities which interrupted their intercourse with the territory or nationals of the third State. Such measures would be taken by the Member in performance of treaty provisions of which the third State and its nationals had full notice, and in defense of interests which it considered vital, by way of exercise of its territorial sovereignty.

2. *Measures Applicable outside the Territorial Jurisdiction of the Member of the League.*

It is under this head that measures to be taken at sea fall to be considered.

If a state of war has been declared by the Members of the League against the aggressor State, Article 16 appears to contemplate all or any measures consistent with the laws of war. If the Members of the League do not claim that a state of war exists, and are thereby precluded from demanding the full rights of belligerents against third States under the general principles of international law, the weapon which previous international practice may be held to place at their disposal is the so-called "pacific blockade" to which special reference is made in the question asked by the Council.

It would not in fact be prudent to attempt to lay down positively in advance the measures which the Members of the League could consider themselves as legally entitled to adopt towards third States under the form of a pacific blockade. Not merely is the existing law uncertain, but it is uncertain how far third States would or would not be disposed to take a narrow view of the application of the existing law to the special and unprecedented case of a pacific blockade applied under Article 16 of the

Covenant. The tendency before the war of 1914-18 was to recognise that a pacific blockade imposed in the interests of international order by a number of Powers had a much higher claim to be regarded as an institution of international law than a blockade enforcing the particular interests of certain Powers, and a blockade under Article 16 is in the fullest sense one falling within the first category.

It appears to be a legitimate conclusion from the practice and doctrine of international law before the war of 1914-18 that a pacific blockade imposed in application of Article 16 of the Covenant and observing certain conditions and limits would be a measure the legal validity of which should be recognised by third States. To secure such recognition from third States, it would seem that the blockade ought to comply with the conditions as to notification and effectiveness which apply to a blockade in time of war. The blockade would give the right not to confiscate but to sequester ships of the blockaded State attempting to break through it and their cargoes, the ships and cargoes being ultimately returned without compensation to their owners. It would seem, further, that third States would not legally be entitled to object to the enforcement of the blockade, with the suggested consequences, against ships of Members of the League, whether applying the sanctions or not, and their cargoes.

On the other hand, it is very doubtful whether the third State would be legally bound to acquiesce in the enforcement of the blockade against its own ships and their cargoes.¹

If, however, ships of third States are free to pass the blockade, there is an obvious danger that the utilisation of such shipping for intercourse with the blockaded State may greatly diminish the efficiency of the economic sanctions.

To meet this difficulty there seem to be the following possibilities:

(1) Third States may in fact be led, by their sense of the importance to the whole world of the observance of the methods of pacific settlement laid down by the Covenant, or by sympathy with the League's attitude in the particular case, to acquiesce in the application of the pacific blockade to their own ships.

(2) In previous cases, refusal of third States to recognise the legitimacy of a pacific blockade affecting their ships has led to no actual change in the measures adopted but to the formal declaration of a state of war for the purpose of investing the blockading Powers with the rights of belligerents.

It is clear that a third State would incur a great moral responsibility if it were to compel the Members of the League to depart from the policy of seeking to secure the due observance of the Covenant without formal resort to war.

¹ See *Pacific Blockade*, § 127.—ED.

(3) Previous cases suggest the possibility that the Members of the League might not be obliged to declare themselves at war, but that the third State might consider it proper, for its part, to treat them as belligerents in order to exercise towards them the rights and responsibilities of a neutral and safeguard itself against possible complaints of breach of neutrality from the side of the Covenant-breaking State.

Neither of the last two possibilities would involve armed hostilities on the part of the Members of the League against the Covenant-breaking State or prevent them from making clear to the latter at all times their willingness to secure immediate peaceful settlement of the questions at issue.

§ 136. SANCTIONS UNDER THE LEAGUE COVENANT (Continued)

Co-ordination of Measures under Article 16 of the Covenant, Italo-Ethiopian Controversy

On October 7, 1935, the Council of the League of Nations adopted a report of a Committee of the Council, which after reciting the military operations by Italy in Ethiopia, and the invocation of Article 16 of the Covenant by Ethiopia, declared that when a Member of the League invoked Article 16 of the Covenant each of the other members is bound to consider the circumstances of the particular case, and that it was "not necessary that war should have been formally declared for Article 16 to be applicable." The Committee then came to the conclusion "that the Italian Government has resorted to war in disregard of its covenants under Article 12 of the Covenant of the League of Nations." The minutes of the Council Meeting of October 7 record the President as saying: "I take note that fourteen members of the League of Nations represented on the Council [all Council members except Italy] consider that we are in the presence of a war begun in disregard of the obligations of Article 12 of the Covenant. . . . The Council has now to assume its duty of coordination in regard to the measures to be taken under Article 16. Since the Assembly of the League of Nations is convened for the day after tomorrow, October 9, 1935, my colleagues will doubtless feel it desirable to associate the Assembly with their task."

On October 10, 1935, the Assembly adopted the "Recommendation" printed below, which the President stated to be "not a resolution, in the strict sense of the word, but an invitation addressed by the Assembly to the States Members." This, in his opinion, avoided the question whether a majority or a unanimous vote was required. Representatives of Austria, Hungary, Italy, and Albania refused to accept the "Recommendation." Fifty other States accepted it, or remained silent, silence by agreement indicating acceptance. A Co-ordination Committee was then set up, which recommended the "Proposals," printed below, which were widely adopted by Member States. The application of these Proposals by the Member States constituted the first practical test of sanctions under Article 16 of the League Covenant.

PRINCIPAL DOCUMENTS OF THE FIRST SESSION (OCTOBER 11-19, 1935)

League of Nations Document: Co-ordination Committee 40.
Publications of the League of Nations, General. 1935. 6. Pp. 2-12.

RECOMMENDATION ADOPTED BY THE ASSEMBLY ON OCTOBER 10TH, 1935

The Assembly,

Having taken cognisance of the opinions expressed by the members of the Council at the Council's meeting of October 7, 1935;

Taking into consideration the obligations which rest upon the Members of the League of Nations in virtue of Article 16 of the Covenant and the desirability of co-ordination of the measures which they may severally contemplate;

Recommends that Members of the League of Nations, other than the parties, should set up a Committee, composed of one delegate, assisted by experts, for each Member, to consider and facilitate the co-ordination of such measures and, if necessary, to draw the attention of the Council or the Assembly to the situations requiring to be examined by them.

MUTUAL SUPPORT

DECLARATION ADOPTED BY THE CO-ORDINATION COMMITTEE
ON OCTOBER 14TH, 1935

With a view to facilitating for the Governments of the Members of the League of Nations the execution of their obligations under Article 16 of the Covenant, it is recognised that any proposals for action under Article 16 are made on the basis of the following provisions of that article:

The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the Covenant-breaking State.

EXECUTION OF OBLIGATIONS WHICH FLOW FROM ARTICLE 16
OF THE COVENANTRESOLUTION ADOPTED BY THE CO-ORDINATION COMMITTEE
ON OCTOBER 16TH, 1935

The Committee of Co-ordination,

Considering that it is important to ensure rapid and effective application of the measures which have been and may subsequently be proposed by the Committee;

Considering that it rests with each country to apply these measures in accordance with its public law and, in particular, the powers of its Government in regard to execution of treaties:

Calls attention to the fact that the Members of the League, being bound by the obligations which flow from Article 16 of the Covenant, are under a duty to take the necessary steps to enable them to carry out these obligations with all requisite rapidity.

PROPOSAL I

Adopted by the Co-ordination Committee on October 11th, 1935

EXPORT OF ARMS, AMMUNITION AND IMPLEMENTS OF WAR

With a view to facilitating for the Governments of the Members of the League of Nations the execution of their obligations under Article 16 of the Covenant, the following measures should be taken forthwith:

(1) The Governments of the Members of the League of Nations which are enforcing at the moment measures to prohibit or restrict the exportation, re-exportation or transit of arms, munitions and implements of war to Ethiopia will annul these measures immediately;

(2) The Governments of the Members of the League of Nations will prohibit immediately the exportation, re-exportation or transit to Italy or Italian possessions of arms, munitions and implements of war enumerated in the attached list;

(3) The Governments of the Members of the League of Nations will take such steps as may be necessary to secure that arms, munitions and implements of war, enumerated in the attached list, exported to countries other than Italy will not be re-exported directly or indirectly to Italy or to Italian possessions;

(4) The measures provided for in paragraphs 2 and 3 are to apply to contracts in process of execution.

Each Government is requested to inform the Committee, through the Secretary-General of the League, within the shortest possible time of the measures which it has taken in conformity with the above provisions.¹

ANNEX²

ARTICLES CONSIDERED AS ARMS, AMMUNITION AND IMPLEMENTS OF WAR

Category I.

1. Rifles and carbines and their barrels.
2. Machine-guns, automatic rifles and machine-pistols of all calibers and their barrels.

¹ At the end of January, 1936, Proposal I had "been accepted by fifty-two Governments, of which fifty have notified the Co-ordination Committee of its entry into force; legislative texts have been received from forty-four Governments."—*O.J. (Spec. Supp. 1936)*, No. 151, p. 86—Ed.

² This list was adopted on October 16, 1935 (Proposal 1A).

3. Guns, howitzers and mortars of all calibers, their mountings, barrels and recoil mechanisms.

4. Ammunition for the arms enumerated under 1 and 2 above; filled and unfilled projectiles for the arms enumerated under 3 above, and prepared propellant charges for these arms.

5. Grenades, bombs, torpedoes and mines, filled or unfilled, and apparatus for their use or discharge.

6. Tanks, armoured vehicles and armoured trains. Armour-plate of all kinds.

Category II.

Vessels of war of all kinds, including aircraft-carriers and submarines.

Category III.

1. Aircraft, assembled or dismantled, both heavier and lighter than air, and their propellers or air-screws, fuselages, aerial gun-mounts and frames, hulls, tail units and under-carriage units.

2. Aircraft-engines.

Category IV.

Revolvers and automatic pistols of a weight in excess of 1 lb. 6 oz. (630 grammes) and ammunition therefor.

Category V.

1. Flame-throwers and all other projectors used for chemical or incendiary warfare.³

2. Mustard gas, Lewisite, ethyldichlorarsine, methyldichlorarsine, and all other products destined for chemical or incendiary warfare.³

3. Powder for war purposes, and explosives.

PROPOSAL II

Adopted by the Co-ordination Committee on October 14th, 1935

FINANCIAL MEASURES

With a view to facilitating for the Governments of the Members of the League of Nations the execution of their obligations under Article 16 of the Covenant, the following measures should be taken forthwith:

The Governments of the Members of the League of Nations will forthwith take all measures necessary to render impossible the following operations:

³ It should be observed that the utilisation of these articles has been, and still is, prohibited under the Convention of June 17, 1925. These articles are only mentioned above because their manufacture being free (the more so, as in many instances they serve various purposes), the Committee desires to emphasise that the export of such products could in no circumstances be tolerated.

(1) All loans to or for the Italian Government and all subscriptions to loans issued in Italy or elsewhere by or for the Italian Government;

(2) All banking or other credits to or for the Italian Government and any further execution by advance, overdraft or otherwise of existing contracts to lend directly or indirectly to the Italian Government;

(3) All loans to or for any public authority, person or corporation in Italian territory and all subscriptions to such loans issued in Italy or elsewhere;

(4) All banking or other credits to or for any public authority, person or corporation in Italian territory and any further execution by advance, overdraft or otherwise of existing contracts to lend directly or indirectly to such authority, person or corporation;

(5) All issues of shares or other capital flotations for any public authority, person or corporation in Italian territory and all subscriptions to such issues of shares or capital flotations in Italy or elsewhere;

(6) The Governments will take all measures necessary to render impossible the transactions mentioned in paragraphs (1) to (5), whether effected directly or through intermediaries of whatsoever nationality.

The Governments are invited to put in operation at once such of the measures recommended as can be enforced without fresh legislation, and to take all practicable steps to secure that the measures recommended are completely put into operation by October 31st, 1935. Any Governments which find it impossible to secure the requisite legislation by that date are requested to inform the Committee, through the Secretary-General, of the date by which they expect to be able to do so.

Each Government is requested to inform the Committee, through the Secretary-General of the League, within the shortest possible time of the measures which it has taken in conformity with the above provisions.⁴

PROPOSAL III

Adopted by the Co-ordination Committee on October 19th, 1935

PROHIBITION OF IMPORTATION OF ITALIAN GOODS

With a view to facilitating for the Governments of the Members of the League of Nations the execution of their obligations under Article 16 of the Covenant, the following measures should be taken:

(1) The Governments of the Members of the League of Nations will prohibit the importation into their territories of all goods (other than gold or silver bullion and coin) consigned from or grown, produced or manufactured in Italy or Italian possessions, from whatever place arriving;

⁴ At the end of January, 1936, Proposal II had "been accepted by fifty-two Governments, of which fifty have notified the Co-ordination Committee of its entry into force; legislative texts have been received from forty-one Governments."—*O.J. (Spec. Supp., 1936), No. 151, p. 86.*—ED.

(2) Goods grown or produced in Italy or Italian possessions which have been subjected to some process in another country, and goods manufactured partly in Italy or Italian possessions and partly in another country will be considered as falling within the scope of the prohibition unless 25% or more of the value of the goods at the time when they left the place from which they were last consigned is attributable to processes undergone since the goods last left Italy or Italian possessions;

(3) Goods the subject of existing contracts will not be excepted from the prohibition;

(4) Goods *en route* at the time of imposition of the prohibition will be excepted from its operation. In giving effect to this provision, Governments may, for convenience of administration, fix an appropriate date, having regard to the normal time necessary for transport from Italy, after which goods will become subject to the prohibition;

(5) Personal belongings of travelers from Italy or Italian possessions may also be excepted from its operation.

Having regard to the importance of collective and, so far as possible, simultaneous action in regard to the measures recommended, each Government is requested to inform the Co-ordination Committee, through the Secretary-General, as soon as possible, and not later than October 28th, of the date on which it could be ready to bring these measures into operation.⁵ The Co-ordination Committee will meet on October 31st for the purpose of fixing, in the light of the replies received, the date of the coming into force of the said measures.

ANNEX

REPORT SUBMITTED BY THE LEGAL SUB-COMMITTEE ON THE APPLICATION OF SANCTIONS AND PRIVATE CONTRACTS, COMMERCIAL TREATIES AND TREATIES OF FRIENDSHIP AND NON-AGGRESSION

[Omitted.]

PROPOSAL IV

Adopted by the Co-ordination Committee on October 19th, 1935

EMBARGO ON CERTAIN EXPORTS TO ITALY

With a view to facilitating for the Governments of the Members of the League of Nations the execution of their obligations under Article 16 of the Covenant, the following measures should be taken:

⁵ At the end of January, 1936, Proposal III had "been accepted by fifty Governments, of which forty-four have notified the Co-ordination Committee of its entry into force; legislative texts have been received from thirty-nine Governments."—*O.J. (Spec. Supp., 1936)*, No. 151, p. 86.—Ed.

(1) The Governments of the Members of the League of Nations will extend the application of paragraph (2) of Proposal I of the Co-ordination Committee to the following articles as regards their exportation and re-exportation to Italy and Italian possessions, which will accordingly be prohibited:

- (a) Horses, mules, donkeys, camels and all other transport animals;
- (b) Rubber;
- (c) Bauxite, aluminium and alumina (aluminium-oxide), iron-ore and scrap-iron;

Chromium, manganese, nickel, titanium, tungsten, vanadium, their ores and ferro-alloys (and also ferro-molybdenum, ferro-silicon, ferro-silico-manganese and ferro-silico-manganese-aluminium);

Tin and tin-ore.

List (c) above, includes all crude forms of the minerals and metals mentioned and their ores, scrap and alloys;

(2) The Governments of the Members of the League of Nations will take such steps as may be necessary to secure that the articles mentioned in paragraph (1) above exported to countries other than Italy or Italian possessions will not be re-exported directly or indirectly to Italy or to Italian possessions;

(3) The measures provided for in paragraphs (1) and (2) above are to apply to contracts in course of execution;

(4) Goods *en route* at the time of imposition of the prohibition will be excepted at the time of imposition of the prohibition will be excepted from its operation. In giving effect to this provision, Governments may, for convenience of administration, fix an appropriate date, having regard to the normal time necessary for transport to Italy or Italian possessions, after which goods will become subject to the prohibition.

Having regard to the importance of collective and, so far as possible, simultaneous action in regard to the measures recommended, each Government is requested to inform the Co-ordination Committee, through the Secretary-General, as soon as possible, and not later than October 28th, of the date on which it could be ready to bring these measures into operation.⁶ The Committee of Co-ordination will meet on October 31st for the purpose of fixing, in the light of the replies received, the date of the coming into force of the said measures.

The attention of the Co-ordination Committee has been drawn to the possible extension of the above proposal to a certain number of other articles. It entrusts the Committee of Eighteen with the task of making any suitable proposals to Governments on this subject.

⁶ At the end of January, 1936, Proposal IV had "been accepted by fifty Governments, of which forty-seven have notified the Co-ordination Committee of its entry into force; legislative texts have been received from forty-one Governments."—O.J. (*Spec. Supp.*, 1936), No. 151, p. 86.—ED.

ANNEX

REPORT SUBMITTED BY THE LEGAL SUB-COMMITTEE ON THE APPLICATION OF
SANCTIONS AND PRIVATE CONTRACTS, COMMERCIAL TREATIES AND
TREATIES OF FRIENDSHIP AND NON-AGGRESSION

[Omitted.]

PROPOSAL V

Adopted by the Co-ordination Committee on October 19th, 1935

ORGANISATION OF MUTUAL SUPPORT

The Co-ordination Committee draws the special attention of all Governments to their obligations under paragraph 3 of Article 16 of the Covenant, according to which the Members of the League undertake mutually to support one another in the application of the economic and financial measures taken under this article.

I. With a view to carrying these obligations into effect, the Governments of the Members of the League of Nations will:

(a) Adopt immediately measures to assure that no action taken as a result of Article 16 will deprive any country applying sanctions of such advantages as the commercial agreements concluded by the participating States with Italy afforded it through the operation of the most-favoured-nation clause;

(b) Take appropriate steps with a view to replacing, within the limits of the requirements of their respective countries, imports from Italy by the import of similar products from the participating States;

(c) Be willing, after the application of economic sanctions, to enter into negotiations with any participating country which has sustained a loss with a view to increasing the sale of goods so as to offset any loss of Italian markets which the application of sanctions may have involved;

(d) In cases in which they have suffered no loss in respect of any given commodity, abstain from demanding the application of any most-favoured-nation clause in the case of any privileges granted under paragraphs (b) and (c) in respect to that commodity.

II. With the above objects, the Governments will, if necessary with the assistance of the Committee of Eighteen, study, in particular, the possibility of adopting, within the limits of their existing obligations, and taking into consideration the annexed opinion of the Legal Sub-Committee of the Co-ordination Committee, the following measures:

(1) The increase by all appropriate measures of their imports in favour of such countries as may have suffered loss of Italian markets on account of the application of sanctions;

(2) In order to facilitate this increase, the taking into consideration of the obligations of mutual support and of the advantages which the trade of certain States Members of the League of Nations, not participating in the sanctions, would obtain from the application of these sanctions, in order to reduce by every appropriate means and to an equitable degree imports coming from these countries;

(3) The promotion, by all means in their power, of business relations between firms interested in the sale of goods in Italian markets which have been lost owing to the application of sanctions and firms normally importing such goods;

(4) Assistance generally in the organisation of the international marketing of goods with a view to offsetting any loss of Italian markets which the application of sanctions may have involved.

They will also examine, under the same conditions, the possibility of financial or other measures to supplement the commercial measures, in so far as these latter may not ensure sufficient international mutual support.

III. The Co-ordination Committee requests the Committee of Eighteen to afford, if necessary, to the Governments concerned the assistance contemplated at the beginning of Part II of the present proposal.⁷

ANNEX

REPORT SUBMITTED BY THE LEGAL SUB-COMMITTEE ON THE APPLICATION OF THE MOST-FAVOURLED-NATION CLAUSE

[Omitted.]

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COMMUNICATION TO STATES NON-MEMBERS OF THE LEAGUE OF NATIONS TEXT APPROVED BY THE CO-ORDINATION COMMITTEE ON OCTOBER 19TH, 1935

The President of the Committee of Co-ordination of measures to be taken under Article 16 of the Covenant has the honor to transmit herewith to States non-members of the League, in accordance with the decision of the Co-ordination Committee formed as the result of the recommendation adopted by the Assembly on October 10th, the principal recent documents in the Italo-Ethiopian dispute, including the Minutes of the Council of October 7th, the Minutes of the Assembly of October 9th to 11th, and the recommendations of the Co-ordination Committee.

He is instructed to add that the Governments represented on the Co-ordination Committee would welcome any communication which any non-

⁷ On June 10, 1936, Proposal V had been accepted by forty-six governments.—*O.J. (Spec. Supp., 1936)*, No. 151, p. 87.—Ed.

member State may deem it proper to make or notification of any action which it may be taking in the circumstances.⁸

§ 137. SANCTIONS UNDER THE LEAGUE COVENANT (*Concluded*): TERMINATION OF SANCTIONS

Report Adopted by the Assembly of the League of Nations July 4, 1936

League of Nations Official Journal (Spec. Supp., 1936), No. 151,
pp. 65-66.

I.

The Assembly,

(1) Having met again on the initiative of the Government of the Argentine Republic, and in pursuance of the decision to adjourn its session taken on October 11th, 1935, in order to examine the situation arising out of the Italo-Ethiopian dispute;

(2) Taking note of the communications and declarations which have been made to it on this subject;

(3) Noting that various circumstances have prevented the full application of the Covenant of the League of Nations;

(4) Remaining firmly attached to the principles of the Covenant, which are also expressed in other diplomatic instruments such as the declaration of the American States, dated August 3rd, 1932, excluding the settlement of territorial questions by force;

(5) Being desirous of strengthening the authority of the League of Nations by adapting the application of these principles to the lessons of experience;

(6) Being convinced that it is necessary to strengthen the real effectiveness of the guarantees of security which the League affords to its Members:
Recommends that the Council:

(a) Should invite the Governments of the Members of the League to send to the Secretary-General, so far as possible before September 1st, 1936, any proposals they may wish to make in order to improve, in the spirit or within the limits laid down above, the application of the principles of the Covenant;

(b) Should instruct the Secretary-General to make a first examination and classification of these proposals;

(c) Should report to the Assembly at its next meeting on the state of the question.

⁸ For neutrality measures of the United States in the Italo-Ethiopian conflict, see § 190 below. For a report on the measures taken under Article 16 in the Italo-Ethiopian dispute, see Report on the Work of the League to the 17th Ordinary Session of the Assembly, *O.J. Spec. Supp.* No. 151, pp. 83-92. See also J. H. Spencer, "The Italian-Ethiopian Dispute and the League of Nations," 31 *A.J.I.L.* (1937), 614.—Ed.

II.

The Assembly,

Taking note of the communications and declarations which have been made to it on the subject of the situation arising out of the Italo-Ethiopian dispute;

Recalling the previous findings and decisions in connection with this dispute:

Recommends that the Co-ordination Committee should make all necessary proposals to the Governments in order to bring to an end the measures taken by them in execution of Article 16 of the Covenant.

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QUESTIONS AND PROBLEMS

Students are urged to read all the materials in the chapter before attempting to answer the questions and problems.

1. What is meant by "measures of redress short of war"? What common features do they have? Do they always involve the use of force? Are they always used to secure redress of an international legal wrong? What is meant by the principle of proportionality?
2. What was the *Naulilaa Claim* (§ 124)? Describe each step in the reasoning of the arbitration tribunal. On the basis of this reasoning, state as exactly as you can the principles governing reprisals. Is it usual to have cases of reprisal submitted to arbitration tribunals? To courts? (See *Gray v. United States*, § 126.)
3. What is meant by the severance of diplomatic relations? Is such severance a serious measure of redress? Does the severance of diplomatic relations mean the imminence of war between the States concerned? Are there lesser measures of redress analogous in character?

4. What is meant by nonintercourse? By embargo? Identify all the materials in this chapter having to do with nonintercourse and embargo.

5. What were the facts in the case of the *Boedes Lust* (§ 125)? What were the precise issues presented by the facts? How did the Court decide these issues?

What was the nationality of the persons whose vessel was seized? What was their place of residence? Of what significance are these facts? What is an embargo? Was the embargo declared during a state of war? Would the embargo operate to confiscate Dutch property even though no state of war subsequently ensued?

Did war subsequently ensue? What was the effect of this on the effects of the embargo?

Does a declaration of embargo necessarily involve a subsequent state of war? In the reasonable expectation that war would not ensue and make the embargo hostile and retroactive, could a court restore the property during the period of pacific embargo?

6. An Act of Congress provided that "upon the outbreak or during the progress of any war between two or more states, the President shall proclaim such fact, and it shall thereafter be unlawful to export arms, ammunition, or implements of war" to any of the warring nations. Is this an embargo? Is it the same in character as the measures discussed in the *Boedes Lust* (§ 125)?

7. An Act of Congress of December 22, 1807, forbade merchant vessels to sail from ports in the United States to any foreign port, with the exception of ships in ballast. Was this an embargo? Is it the same in character as the measures discussed in the *Boedes Lust* (§ 125)? As the measure described in problem 6? Discuss.

8. What are reprisals? How do they differ in definition from measures of redress short of war? Enumerate as many types of reprisals as you can. What is retorsion? Does it differ from reprisals? Explain.

9. What are displays of force? Are they legal methods of redress? What is mobilization? Is it a legal method of redress?

10. What were the facts in *Gray v. United States* (§ 126)? How did these facts happen to be submitted to the Court of Claims? Was this Court an international tribunal? Why was it necessary to decide whether war existed between the United States and France in the period 1791-1800? What did the Court decide on this point? What was the effect of this decision on the disposition of the case?

Had there been any declaration of war? Did the United States regard itself as at war with France? Explain the various sorts of evidence of importance in this connection. Did France regard itself as at war with the United States? Explain the evidence of importance in this connection. What is meant by a "partial" state of war? An "imperfect" war?

Would the reasoning of the Court in this case support Japan in arguing that no war existed 1931— in Manchuria? Would it support Italy in arguing that no war existed in 1935-1936 in Ethiopia?

11. State the existing law of "pacific blockade."

12. What was the nature of the blockade proposed by Germany in 1901? What was the attitude of the United States towards this proposal? What is the

nature of a war blockade? (See §§ 180-183.) What is the effect of such a blockade upon the ships of neutral States? Was Germany's proposal one of a war blockade?

What questions were submitted to the Tribunal of Arbitration? How were they decided? Did the judgment throw any light on the question whether there could be a "pacific blockade"? Did the Tribunal think that a blockade was a legal method of procedure for the settlement of international claims? Can you justify the Tribunal's award?

Did a war exist between Germany, Great Britain and Italy on the one side and Venezuela on the other? Give arguments on both sides.

13. What were the reasons which led the United States to intervene in Haiti in 1915 (§ 128)? At whose request did the Navy Department send Admiral Caperton the telegram of July 28? How did Admiral Caperton analyze the situation on August 2? What change had taken place between August 2 and August 5? What was the purpose and the content of the Proclamation of August 9? In the message received by the Admiral on August 10, can any special importance be attached to the sentence: "The United States prefers election of Dartiguenave. . ."? What were the stipulations laid down in the telegram from the Secretary of State on August 10? Were these stipulations met in the terms of the Treaty subsequently signed? What measures were to be taken for the pacification of the country, and how were they to be financed? Is it your impression that the Treaty which was signed was proposed by Haiti? That it was worked out in the give and take of negotiations on both sides? What is the significance of the following sentences in the telegram of the Secretary of State on August 22: ". . . the treaty ought to be ratified immediately, and at the same time the Haitian Government should invite this Government to enter into a *modus vivendi* embodying the same terms as the treaty and to operate thereunder until the United States Senate has acted upon the treaty," and ". . . the *de facto* President must desire to remove these obstacles. . . he will undoubtedly aid in carrying out the steps suggested"?

14. Read carefully the terms of the Treaty of September 16, 1915, between the United States and Haiti (§ 128, page 647). What arrangements are made concerning finances? The collection of customs? The incurring of debt? Disposition of Haitian territory? Impairment of the independence of Haiti? Development of resources? In case the Treaty is violated by Haiti, does the United States have any recourse under the Treaty?

15. Under the terms of the Treaty of September 16, 1915 (§ 128, page 647), is Haiti an independent State?

16. Was the status of Haiti under the Treaty of September 16, 1915 (§ 128) accepted freely by Haiti, or imposed upon Haiti by the armed forces of the United States? Is Haiti bound to observe this treaty, or could it declare the treaty void as having been signed and ratified under duress?

17. Were the measures taken by the United States in Haiti war? Reprisals? Discuss.

18. What were the circumstances under which Japan's argument as to self-defense was made (§ 130)? On the basis of either the Chinese or the Japanese accounts, was the initial incident on the night of September 18, 1931, a widely spread or a local affair? Did the *Lytton Report* concede that any justification existed for self-defense?

What was the "state of acute tension," and what was the bearing claimed for it by Japan? What was the Japanese answer to the claim that the Japanese troops had acted on a wide scale in accordance with a carefully preconceived plan? To the statement that the Chinese troops had been instructed to avoid recourse to force?

Why did the Kellogg-Briand Pact play a part in the discussion? How was it possible for Japan to quote in its favor a statement of an American Secretary of State? What part of his statement did Japan emphasize, and why? Why did Japan quote the letters of Sir Austen Chamberlain to the American diplomatic representatives in London? What parts of these letters did Japan emphasize, and why? Did the French Government's interpretation differ from that of the British Government? From that of the American Government? From that of the Japanese Government?

Comment on the statement that "in the case of this incident of September 18th, no one except the officers on the spot could possibly be qualified to judge whether or not the action undertaken by the Japanese Army was a measure of self-defense."

What was Daniel Webster's definition of self-defense? Show in detail how Japan brought its actions within the different terms of Webster's definition. Then, still using Webster's definition, make a point-by-point reply to the Japanese argument.

What was the point discussed concerning the *extent* to which measures of self-defense might go? What was the Japanese position? How did Japan use the case of *Navarino*?

In your judgment, what is the crucial issue in the whole controversy? How would you resolve such controversies?

19. Judging from the terms only of Article 16 of the League Covenant (§ 115, page 565), is a Member of the League which violates Articles 12, 13, or 15 of the Covenant automatically at war with all other Members of the League? Explain the phraseology of the Covenant on this point. Are Members of the League individually bound to take any action when such violations occur? Explain. Is this obligation automatic: i. e., when violations of these articles occur, do the "sanctions" of Article 16 come into play of themselves without the operation of additional machinery? Explain as fully as you can in the light of §§ 133-137.

20. What is the character of the Resolutions Concerning the Economic Weapon adopted by the Assembly on October 4, 1921 (§ 134)? Is a State Member of the League which violates Articles 12, 13, or 15 of the Covenant automatically at war with all the other Members of the League? Explain. Does a majority vote of League Members decide when a Member has violated these Articles? Explain. What is the procedure for determining this point?

Could the League excuse a specific Member State from applying sanctions once agreed upon? Explain.

Is it known in advance what sanctions will be applied to a covenant-breaker under Article 16? Explain.

What do the Resolutions have to say about (a) the maintenance of diplomatic relations with a State to which sanctions are being applied? (b) consular relations? (c) "enemy character"? (d) cutting off food supplies of civil population of defaulting State?

What do the Resolutions provide concerning blockade of the covenant-breaking State? Would all Members have to participate in the blockade?

21. Compare some good account of the application of sanctions to Italy (e.g., that of J. H. Spencer in 31 *A.J.I.L.* [1937], 614) with the character of sanctions forecast in 1921 by the Assembly Resolutions (§ 134). To what extent are the sanctions applied to Italy more stringent than those in the Resolutions? Less stringent?

22. Judging from the Report by the Secretary General printed as § 135, and any other relevant materials, what would be the rights of the respective States in the following situations?

State X is a Member of the League of Nations. Its military forces invade State Y, also a Member. The Council of the League votes that X has violated Article 12 of the Covenant, and to proceed under Article 16. China and the Union of South Africa, not represented on the League Council, vote in the Assembly against a declaration that State X has violated Article 16 or incurred sanctions, though all other Members of the League (State X excluded) do so agree.

(a) State X demands that Members of the League declare war against it. When war is not declared it claims that sanctions are illegal.

(b) State X declares that the imposition of sanctions against it by Great Britain creates a state of war. Great Britain states that it does not regard itself as at war with State X. Does a state of war exist legally? (See materials in Chapter XIV.)

(c) The Council, by unanimous vote, recommends the imposition of a pacific blockade on the coasts of State X. In the Assembly all States but China and the Union of South Africa concur. Great Britain is authorized to carry out the blockade, with the assistance of a few French and Italian ships. (1) A British vessel captures a Polish blockade runner. Poland protests. (2) A British vessel captures a Chinese blockade runner. China protests. (3) A British vessel captures an American blockade runner. The United States protests. Are these protests legally valid?

(d) The Council, by unanimous vote, agrees to recommend that all Member States embargo shipments of all goods from their territories to State X. In the Assembly only China and the Union of South Africa fail to concur. The United States, France, and the Union of South Africa fail to embargo such shipments. Are they legally entitled to do so?

23. What action was taken with respect to Italy on October 7, 1935, by the Council of the League (§ 136)? What was the significance of this action? Could the subsequent actions embodied in Proposals I-V have been taken without the action of October 7? Explain carefully. What is the significance of the Recommendation adopted by the Assembly on October 10, 1935? Of the Declaration adopted by the Co-ordination Committee October 14, 1935? Of the Resolution of the Co-ordination Committee on October 16, 1935?

24. What is the character of the Recommendation of the Assembly adopted on October 10, 1935? Would it have been possible to take the actions embodied in Proposals I-V without having taken this action previously?

25. What is the content and effect of Proposal I (§ 136)? Why was it adopted? What is contained in the annexed list? How does this list compare

with the list printed in § 190 below? What is the significance of this? How does this list compare with the contraband lists printed in the *Declaration of London* (§ 181)? What is the significance of this?

26. What is the content and effect of Proposal II? How does it compare with the provisions of the neutrality laws of the United States printed in § 191? With the provisions of the *Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land* (§ 177)?

27. What is the content and effect of Proposal III?

28. What is the content and effect of Proposal IV? How does it compare with the provisions of the recent neutrality legislation of the United States (§ 191)? With the provisions of the *Hague Convention (V)* (§ 177)? With the contraband provisions of the *Declaration of London* (§ 181)?

29. What is the content and effect of Proposal V? With what part of Article 16 of the Covenant is it connected?

30. States X and Y are using force against each other but have made no declaration of war. States A, B, and C agree severally and jointly to boycott both X and Y until they cease to use force. The boycott has been proclaimed but no detailed instructions have been given to the navies.

(a) A cruiser of State A, the *Ajax*, meets a merchant vessel of State B, the *Banner*, apparently bound for a port of X. What should the *Ajax* do? Would it make any difference if the *Banner* has sailed before the boycott was proclaimed? Would a cruiser of B, the *Brook*, act in the same manner?

(b) A cruiser of State C, the *Crown*, meets a merchant vessel of State X bound for State B. What action may it take?

(c) The *Crown* later meets a merchant vessel of State D, the *Drone*, bound for State X. What action may the *Crown* take?

(d) What action may the cruisers of States A, B, and C take against a vessel of war of State X convoying merchant vessels of X, or convoying merchant vessels of States D, E, and F?—U. S. Naval War College, *International Law Situations*, 1932, p. 89.

31. Is there any resemblance between the application of sanctions under Article 16 of the League Covenant and (a) American intervention in Haiti? (b) Japanese intervention in Manchuria? Are there any differences?

32. What are the provisions of the *Hague Convention (II) Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts* (§ 131)? How would this Convention have applied in the case of the "blockade" of Venezuela discussed in § 127, if Venezuela, as was the case, refused to arbitrate the dispute? How would it have applied if Venezuela had offered to arbitrate but Germany, Great Britain, and Italy had refused? If no suggestion of arbitration had been made on either side? If arbitration had been agreed to but Venezuela had refused to accept the award? If Germany, Great Britain, and Italy had refused to accept the award?

Does the Convention apply to a debt which Corporation D of State A owes to bondholders of the nationality of State N and resident therein? How would the Convention apply in the circumstances of the American intervention in Haiti described in § 128?

XIV

The Commencement and the Termination of War

§ 138. WAR A BILATERAL RELATION

War is to be regarded as a relation between *two* States. From the legal point of view, a general war involving many States, consists of many individual wars, each between two States. Thus Garner lists fifty-six wars beginning in the period from July 28, 1914, through July 19, 1918, the German Empire being party to twenty-two of these wars.

Presumably Article 1 of the Hague Convention (III) of 1907 (§140) applies only as between two States both of which have ratified the Convention. There is no provision in this Convention that it is inapplicable in case a ratifying State is joined by a State which has not ratified, but in case this happened the coming in of the nonratifying State would constitute a new war, the commencement of which would not be subject to the Hague Convention (III).

List of Wars Commencing 1914-1918

Reprinted from J. W. Garner, *International Law and the World War*, I, 37-38. By permission of Professor Garner and Longmans, Green & Co.

The following is a list of the belligerents and the dates on which each declared war or recognized the existence of a state of war.¹

- | | |
|---------------------------------|----------------|
| 1. Austria-Hungary—Servia | July 28, 1914 |
| 2. Germany—Russia | August 1, 1914 |
| 3. Germany—France | August 3, 1914 |
| 4. Germany—Belgium | August 4, 1914 |

¹ In each case the State first mentioned declared war upon the State mentioned second. The United States Department of State from time to time issued lists of the nations at war, with the date when each became a belligerent. (The last one issued was published in the *Official Bulletin* of November 7, 1918.) A list giving different dates in some instances and containing summaries and statistical data may be found in 25 *Rev. Gén. de Dr. Int. Pub.*, 85 ff.

5. Great Britain—Germany	August 4, 1914
6. Austria-Hungary—Russia	August 6, 1914
7. Serbia—Germany	August 6, 1914
8. Montenegro—Austria-Hungary	August 7, 1914
9. Montenegro—Germany	August 9, 1914
10. France—Austria-Hungary	August 12, 1914
11. Great Britain—Austria-Hungary	August 12, 1914
12. Japan—Germany	August 23, 1914
13. Austria-Hungary—Japan	August 27, 1914
14. Austria-Hungary—Belgium	August 28, 1914
15. Russia—Turkey	November 3, 1914
16. Great Britain—Turkey	November 5, 1914
17. France—Turkey	November 6, 1914
18. Belgium—Turkey	November 6, 1914
19. Serbia—Turkey	December 2, 1914
20. Italy—Austria-Hungary	May 23, 1915
21. San Marino—Austria-Hungary	June 3, 1915
22. Italy—Turkey	August 21, 1915
23. Bulgaria—Serbia	October 14, 1915
24. Russia—Bulgaria	October 18, 1915
25. France—Bulgaria	October 18, 1915
26. Great Britain—Bulgaria	October 19, 1915
27. Italy—Bulgaria	October 19, 1915
28. Germany—Portugal	March 9, 1916
29. Austria-Hungary—Portugal	March 15, 1916
30. Roumania—Austria-Hungary	August 27, 1916
31. Italy—Germany	August 28, 1916
32. Germany—Roumania	August 28, 1916
33. Turkey—Roumania	September 1, 1916
34. Bulgaria—Roumania	September 1, 1916
35. The United States—Germany	April 6, 1917
36. Panama—Germany	April 7, 1917
37. Cuba—Germany	April 7, 1917
38. Brazil—Germany	October 26, 1917
39. Greece—Bulgaria	July 2, 1917
40. Greece—Austria-Hungary	July 2, 1917
41. Greece—Turkey	July 2, 1917
42. Siam—Austria-Hungary	July 22, 1917
43. Siam—Germany	July 22, 1917
44. Liberia—Germany	August 4, 1917
45. China—Germany	August 14, 1917
46. China—Austria-Hungary	August 14, 1917
47. The United States—Austria-Hungary	December 7, 1917
48. Greece—Germany	July 2, 1917
49. Panama—Austria-Hungary	December 10, 1917

50. Cuba—Austria-Hungary	December 16, 1917
51. Guatemala—Germany	April 21, 1918
52. Nicaragua—Austria-Hungary	May 6, 1918
53. Nicaragua—Germany	May 6, 1918
54. Costa Rica—Germany	May 24, 1918
55. Haiti—Germany	July 15, 1918
56. Honduras—Germany	July 19, 1918

To this long list should be added Albania, whose position in the war was somewhat anomalous. Soon after the outbreak of the war its territory was occupied by the Greeks, Servians, and Montenegrins. Later the Servians and Montenegrins were driven out by the Austro-Hungarian forces, and the Greeks were expelled by Italian and French forces. The French and Italians appear to have been greeted by the Albanians as liberators, and they thereupon took the side of the Entente powers and joined with them in the prosecution of the war against the Central powers. Finally it may be added that in the summer of 1918 the governments of the United States, Great Britain, France, and Italy recognized the Czecho-Slovaks as a belligerent power.²

§ 139. THE OLDER LAW IN GENERAL: COMMENCEMENT OF CIVIL WAR

The Prize Cases

The Brig *Amy Warwick*—The Schooner *Crenshaw*—The Barque *Hiawatha*—The Schooner *Brilliant*

SUPREME COURT OF THE UNITED STATES, 1862

2 Black (U. S.), 635.

[By proclamations of April 19 and April 27, 1861, President Lincoln declared a blockade of the so-called Confederate States. The vessels involved in these cases attempted to run this blockade, were captured by

² Their territory consisted of a broad belt stretching across the northern part of the dual monarchy and embracing Bohemia, Móravia, Silesia, and a part of Hungary. Their government consisted of a "national council" with headquarters in a foreign country and at the head of which was a "president." Many of the Czecho-Slovaks were of course fighting in the Austrian armies; those who were fighting on the side of the Entente powers formed three "armies": one in Siberia, one in France, and another in Italy. The act of recognition on the part of the United States contained the following passages: "The government of the United States recognizes that a state of belligerency exists between the Czecho-Slovaks thus organized and the German and Austro-Hungarian Empires. It also recognizes the Czecho-Slovak national council as a *de facto* belligerent government, clothed with proper authority to direct the military and political affairs of the Czecho-Slovaks. The government of the United States further declares that it is prepared to enter formally into relations with the *de facto* government thus recognized for the purpose of prosecuting the war against the common enemy, the Empires of Germany and Austria-Hungary."

public vessels of the United States and condemned as prize by District Courts of the United States. The owners in each case appealed from the sentence of condemnation. Only so much of the opinion is given as relates to the validity of the blockade declared by the President.]

MR. JUSTICE GRIER. There are certain propositions of law which must necessarily affect the ultimate decision of these cases, and many others, which it will be proper to discuss and decide before we notice the special facts peculiar to each.

They are, 1st. Had the president a right to institute a blockade of ports in possession of persons in armed rebellion against the government, on the principles of international law, as known and acknowledged among civilized States?

2d. Was the property of persons domiciled or residing within those States a proper subject of capture on the sea as "enemies' property"?

I. Neutrals have a right to challenge the existence of a blockade *de facto*, and also the authority of the party exercising the right to institute it. They have a right to enter the ports of a friendly nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion, for the purpose of subduing the enemy.

That a blockade *de facto* actually existed, and was formally declared and notified by the president on the 27th and 30th of April, 1861, is an admitted fact in these cases.

That the president, as the executive chief of the government and commander-in-chief of the army and navy, was the proper person to make such notification, has not been, and cannot be disputed.

The right of prize and capture has its origin in the "*jus belli*," and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist *de facto*, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in possession of the other.

Let us inquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force.

War has been well defined to be, "That state in which a nation prosecutes its right by force."

The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other.

Insurrection against a government may or may not culminate in an

organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest *a war*. They claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

“A civil war,” says Vattel, “breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms.

“This being the case, it is very evident that the common laws of war—those maxims of humanity, moderation, and honor—ought to be observed by both parties in every civil war. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals, &c., &c.; the war will become cruel, horrible, and every day more destructive to the nation.”

As a civil war is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history which the court is bound to notice and know.

The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: “When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, *civil war exists* and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land.”

By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of

States, by virtue of any clause in the Constitution. The Constitution confers on the president the whole executive power. He is bound to take care that the laws be faithfully executed. He is commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the acts of congress of February 28, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.

If a war be made by invasion of a foreign nation, the president is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "*unilateral*." Lord Stowell (1 Dodson, 247) observes, "It is not the less a war on *that account*, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other."

The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the act of congress of May 13, 1846, which recognized "*a state of war as existing by the act of the Republic of Mexico*." This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the act of the president in accepting the challenge without a previous formal declaration of war by Congress.

This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of *war*. The president was bound to meet it in the shape it presented itself, without waiting for congress to baptize it with a name; and no name given to it by him or them could change the fact.

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. In the case of the Santissima Trinidad (7 Wheaton, 337), this court says: "The government of the United States has recognized the existence of a civil

war between Spain and her colonies, and has avowed her determination to remain neutral between the parties. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war." (See also 3 Binn., 252.)

As soon as the news of the attack on Fort Sumter, and the organization of a government by the seceding States, assuming to act as belligerents, could become known in Europe, to wit, on the 13th of May, 1861, the Queen of England issued her proclamation of neutrality, "recognizing hostilities as existing between the government of the United States of America and *certain States* styling themselves the Confederate States of America." This was immediately followed by similar declaration or silent acquiescence by other nations.

After such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war with all its consequences as regards neutrals. They cannot ask a Court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the government and paralyze its power by subtle definitions and ingenious sophisms.

The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this Court are now for the first time desired to pronounce, to wit: That insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not *enemies* because they are *traitors*; and a war levied on the government by traitors, in order to dismember and destroy it, is not a *war* because it is an "insurrection."

Whether the president, in fulfilling his duties as commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions, as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the government to which this power was intrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the court that a state of war existed, which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

The correspondence of Lord Lyons with the secretary of state admits the fact and concludes the question.

If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the

extraordinary session of the legislature of 1861, which was wholly employed in enacting laws to enable the government to prosecute the war with vigor and efficiency. And finally, in 1861, we find congress "*ex majore cautela*" and in anticipation of such astute objection, passing an act "approving, legalizing, and making valid all the acts, proclamations, and orders of the president, &c., as if they had been *issued and done under the previous express authority* and direction of the congress of the United States."

Without admitting that such an act was necessary under the circumstances, it is plain that if the president had in any manner assumed powers which it was necessary should have the authority or sanction of congress, that on the well known principle of law, "*omnis rati habitio retrotrahitur et mandato equiparatur*," this ratification has operated to perfectly cure the defect. In the case of *Brown vs. United States* (8 Cr., 131, 132, 133), Mr. Justice Story treats of this subject, and cites numerous authorities to which we may refer to prove this position, and concludes, "I am perfectly satisfied that no subject can commence hostilities or capture property of an enemy, when the sovereign has prohibited it. But suppose he did, I would ask if the sovereign may not ratify his proceedings, and thus by a retroactive operation give validity to them?"

Although Mr. Justice Story dissented from the majority of the court on the whole case, the doctrine stated by him on this point is correct and fully substantiated by authority.

The objection made to this act of ratification, that it is *ex post facto*, and therefore unconstitutional and void, might possibly have some weight on the trial of an indictment in a criminal court. But precedents from that source cannot be received as authoritative in a tribunal administering public and international law.

On this first question therefore we are of the opinion that the president had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard. . . .

[The Court's discussion of the second question, "What is included in the term 'enemies' property'" is omitted.

[Dissenting opinions of Nelson, J., concurred in by Taney, C. J., and Catron and Clifford, JJ., are omitted.

[Certain of the decrees were affirmed. In the case of the brig *Amy Warwick* ship and cargo presented no question but that of enemy property, and the decree of condemnation was affirmed. The *Hiawatha* was a British vessel which left Richmond after the termination of the period of grace allowed in the proclamation of the blockade. Condemnation of ship and cargo was affirmed. The *Brillante*, a Mexican vessel, was captured attempting to run the blockade out of New Orleans; the Court affirmed condemnation of ship and cargo. The *Crenshaw* was owned by citizens

of Virginia, as was the larger part of her cargo. Condemnation of these was affirmed; but tobacco on board purchased before the war by citizens and residents of New York was restored.]

§ 140. THE HAGUE REQUIREMENT OF DECLARATION

Convention (III) Relative to the Opening of Hostilities

SIGNED AT THE HAGUE, OCTOBER 18, 1907¹

English text from J. B. Scott, *Hague Conventions and Declarations of 1899 and 1907* (1915), pp. 96-97.

[Names of signatories, preamble, and names of plenipotentiaries are omitted.]

ARTICLE 1. The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.

ARTICLE 2. The existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by telegraph. Neutral Powers, nevertheless, cannot rely on the absence of notification if it is clearly established that they were in fact aware of the existence of a state of war.

ARTICLE 3. Article 1 of the present Convention shall take effect in case of war between two or more of the contracting Powers.

Article 2 is binding as between a belligerent Power which is a party to the Convention and neutral Powers which are also parties to the Convention.

[Articles 4-8 dealing with ratifications, adhesions, and so on, and the signatures, are omitted.]

§ 141. THE COMMENCEMENT OF WAR

NOTE BY THE EDITOR

A legal state of war may exist without the conduct of hostilities, just as hostilities may be conducted in the absence of a legal state of war.

¹ The following States have ratified or adhered to this Convention: Austria-Hungary, Belgium, Bolivia, Brazil, China, Denmark, El Salvador, Ethiopia (adhesion deposited August 5, 1935), Finland, France, Germany, Great Britain, Guatemala, Haiti, Japan, Liberia, Luxemburg, Mexico, Netherlands, Nicaragua, Norway, Panama, Poland (adhesion deposited May 9, 1925), Portugal, Roumania, Russia, Siam, Spain, Sweden, Switzerland, and the United States of America. A number of States signed the Convention but did not ratify, including, among belligerents in the World War, such States as Bulgaria, Greece, Italy, Servia, and Turkey (as of August, 1939).

Thus J. B. Moore writes: "Much confusion may be avoided by bearing in mind the fact that by the term war is meant not the mere employment of force, but the existence of the legal condition of things in which rights are or may be prosecuted by force. Thus, if two nations declare war one against the other, war exists, though no force whatever may as yet have been employed. On the other hand, force may be employed by one nation as against another, as in the case of reprisals, and yet no state of war may arise. In such a case there may be said to be an act of war, but no state of war."¹ The materials in Chapter XIII above, especially §§ 126-130, illustrate the conduct of hostilities in the absence of a legal state of war. Several States declared war against Germany during the World War but did not engage in hostilities against her.

Although writers have contended that a declaration of war was necessary before hostilities could legally be begun, practice during the eighteenth and nineteenth centuries contradicted this thesis. In 1883 J. F. Maurice declared that in the years 1700-1870 there were at least 107 cases of undeclared war, and not more than 10 in which war was declared.² There were declarations in the Crimean War, the Franco-Prussian War of 1870, the Russo-Turkish War of 1877, the Spanish-American War of 1898, the Russo-Japanese War of 1904; and declarations were customary during the World War. There was no declaration in the Sino-Japanese War of 1894.³ Hague Convention (III) of 1907 reprinted above must, however, be regarded as legislation somewhat in advance of the usage at the time of its ratification.

Although the Convention has never been denounced, there is now good reason for believing it to be obsolete. There were no declarations of war by China or Japan in 1931 or 1937; by Italy or Ethiopia in 1935; by any of the Powers engaged in the Spanish "Civil War" of 1936; by Germany in the annexations of Austria, Czechoslovakia, and Poland in 1938 and 1939; or by Italy in the annexation of Albania in 1939. It is generally held that the "hostilities" of Article I refer only to hostilities with intent to make war, and not to the use of armed force with no such intent. Even so, States that are Members of the League of Nations have found it better policy to avoid declarations of war entirely even when their conduct of military operations on the territory of other Members has been extensive. A declaration of war followed by hostilities clearly constitutes in law a "resort to war," which if undertaken in violation of Articles 12, 13, or 15 of the Covenant, is deemed an "act of war" against all other Members of the League, and brings in its train the sanctions of Article 16 of the Covenant

¹ Moore, *Digest*, VII, 173.

² *Hostilities without Declaration of War*, p. 4.

³ C. Eagleton, "The Form and Function of the Declaration of War," 32 *A.J.I.L.* (1938), 19, 20-21.

(cf. §§ 133-137). By avoiding a declaration, and relying on the principle that the intent to make war is necessary before the conduct of hostilities constitutes war, the State is in a position to claim that the hostilities it is conducting are not legally a "resort to war" under the Covenant. This course also tends to eliminate declarations of war by the State in whose territory the military operations are conducted, since if it declares war, it has been guilty of a "resort to war" under the Covenant, even though it is the victim of aggression. A declaration of war by one State against another is sufficient to establish a legal state of war, without any act of acceptance by the other State.⁴ After the declaration the other State is apparently bound to regard itself as at war with the declaring State, this being almost the only case in the realm of international law in which an act by one State can bind another. The general acceptance of the Kellogg Pact has also tended to eliminate declarations of war. States which have "renounced" war "as an instrument of national policy," and have agreed never to seek the solution of disputes among them "except by pacific means" find that by omitting to declare war—which declaration would establish an indubitably legal state of war under Hague Convention (III)—they are in a position to claim that, there being no intent to make war, there is no war, and the Kellogg Pact is being observed. It follows, of course, from this that the hostilities, which may be cataclysmic in their nature, the methods pursued, and territorial extent are all, under the Kellogg Pact, "pacific means."

Thus the hostilities recently conducted in China by Japan, and in Ethiopia by Italy, produced no declarations of war and are not legal war under accepted rules of international law, since none of the States intended to make war. All four States were Members of the League of Nations and signatories of the Kellogg Pact. All but Italy had ratified Hague Convention (III). However, Paraguay declared itself in a state of war with Bolivia, a fellow-Member of the League, on May 10, 1933. Bolivia had ratified the Hague Convention, but Paraguay had not.

Wright⁵ thinks that a state of legal war may be thrust upon States which do not admit such status, by a third State which issues a proclamation of neutrality. On October 5, 1935, the President proclaimed that a state of war existed between Ethiopia and Italy, and embargoed arms shipments to these States, pursuant to a Joint Resolution of Congress of August 31, 1935; and on October 7, 1935, the Council of the League of Nations voted that Italy had "resorted to war" against Ethiopia. It is, however, doubtful whether these acts of third States are capable of creating a legal state of war contrary to the intentions of the States involved. At most, the Presidential proclamation constituted notice that the United States would hold Italy and

⁴ *The Eliza Ann* (1813) 1 Dodson 244.

⁵ 29 *A.J.I.L.* (April, 1932), 362.

Ethiopia to the rules governing recognized belligerents; e. g., the rules of visit and search and of blockade, while recognizing the belligerents' right to the benefit of such rules, should they choose to avail themselves of them. The League vote likewise could not create a state of war between Italy and Ethiopia in the absence of the necessary intent in one of those States. It merely declared the attitude of third States, upon which they based their own subsequent action.

Finally, it seems clear that a failure by a Party to Hague Convention (III) to observe its stipulations in beginning hostilities without a declaration or ultimatum does not make the hostilities subsequently conducted any the less subject to conventions governing the conduct of hostilities. Thus, for example, both Italy and Ethiopia regarded themselves as bound during their hostilities by the Red Cross Convention of 1929.⁶

Courts are often called upon to determine when wars begin. Where there is a declaration of war which specifically states the date of the beginning of the war, the courts of that State accept that date. In *The Pedro*,⁷ the United States Supreme Court accepted the date of April 21, 1898, as the beginning of the Spanish-American War, this date having been set retroactively by Congress in its resolution of April 25. But in *United States v. Pelly*,⁸ a British court held that the state of war existed from April 22, because on that date an act of hostility had been committed by American men-of-war against Spanish vessels. Where there is a declaration which does not state a date for the beginning of the war, courts tend to date it from the first overt act of hostilities. (The *Boedes Lust*, above, § 125.) This has the disadvantage that private persons, in the interval between the first act of hostility and the declaration, cannot know whether to conduct themselves as though peace or war existed.

Where there is no declaration courts are forced to find the necessary intent to make war in other acts of the States concerned which throw light on such intent. In *Gray v. United States*, § 126 above, the Court of Claims failed to find such intent in acts of the Executive and Congress, despite a prolonged series of "limited hostilities," and held that there was no state of war. In *The Prize Cases* (1863), § 139 above, the Supreme Court of the United States found that there was such intent, in acts of the President and Congress, in the case of the American Civil War. What acts are necessary to show intent in the absence of a declaration is a troublesome question, but once the courts are convinced of intent they tend to date the war from the first act of overt hostilities. In concluding an interesting study of cases in

⁶ See J. H. Spencer, "Some Legal Aspects of Aircraft in Belligerent Operations," *Proceedings American Society of International Law* (1937), p. 95.

⁷ (1899) 175 U. S. 354.

⁸ (1899) 4 Com. Cases 100.

"English and American Courts and the Definition of War," W. J. Ronan says:

It is submitted that the preceding cases go far toward asserting that material war, the existence of authorized and organized hostilities between two states, creates a legal status of war. Whether one considers that the fact itself makes the state of war, or whether the fact is merely indicative of the intention of the parties, the courts have generally found that the state of war begins with such acts. The adoption of this doctrine on a wider scale would go far toward clearing up the problem of defining the state of war. . . . The present necessity for agreement upon a definition of the legal state of war is only too evident in the light of the present armed hostilities in the Far East. Seemingly, wars are no longer to be declared, so that other criteria, objective in nature, must be found. . . . The neutrality legislation of the United States hinges upon the determination of a state of war by the President. In the Ethiopian-Italian conflict President Roosevelt led the way by asserting that that hostility constituted a state of war. Today, with far greater numbers of troops involved over a much wider area, the President has not yet found a state of war to exist between China and Japan. If the present Sino-Japanese conflict is not war, can so-called violations of the laws of war be charged to either party? If the situation is still one of peace, which state is responsible for damages? The rights of individuals and of states vary according to whether an existing condition is the normal one of peace or the extraordinary one of war. These English and American cases offer a logical approach to the much-needed definition.⁹

Civil wars.—Since a State in which one faction is by force attempting to obtain possession of the government or of substantial control over part of the territory of the parent State practically never declares war against the revolutionaries, the determination of the existence of war in such cases is a special problem. Hague Convention (III) does not apply to civil wars. In the case of the American Civil War, the proclamations of blockade of ports of the Southern States by President Lincoln were in essence a claim that the United States would exercise the rights of war (visit and search, blockade, confiscation of contraband) as against outside States. It was thus entirely proper for Great Britain to issue a proclamation of neutrality, the effect of which was to recognize the same rights in the Southern States, since the American proclamation of blockade was in effect an admission that war was being conducted. In *The Protector*¹⁰ the date of the proclamation of blockade was stated to be that of the commencement of the war; and both it and *The Prize Cases*, § 139 above, were vindications of the British attitude by the United States Supreme Court.

⁹ 31 A.J.L.L. (1937), 642, 658.

¹⁰ (1871) 12 Wallace (U. S.) 700.

While parent States do not declare war against revolutionaries, or admit the capacity of revolutionaries to declare war against them, they ordinarily grant belligerent rights of some sort to revolutionaries; e. g., in the treatment of revolutionary soldiers as combatants subject to the laws of war, and not as criminals. This is an admission that war exists. Third States may grant belligerent rights to the contending parties by a proclamation of neutrality, but they are not bound to do so, even if the parent State has granted belligerent rights to revolutionaries by proclaiming a blockade. A proclamation of neutrality binds the neutral State to submit to the exercise of the rights of war (e. g., visit and search, blockade, confiscation of contraband) as regards its commerce, and to prevent the use of its territory as a base of military operations by either belligerent party. These obligations may be so onerous that third States prefer not to extend belligerent rights by a declaration of neutrality. This was the case in the Spanish Civil War beginning in 1936. Though the Madrid Government had proclaimed a blockade, outside States refused to grant either party belligerent rights, and insisted on normal peacetime freedom for their commerce except in Spanish territorial waters.¹¹

§ 141a. THE TERMINATION OF WAR

NOTE BY THE EDITOR

Says Pitt Cobbett:

The three possible ways in which war may terminate are: (1) By a definite cessation of hostilities on either side; (2) by the conquest and complete absorption of one belligerent State by the other; and (3) by the conclusion of a Treaty of peace. The termination of war by mere cessation of hostilities is now rare, although not unknown even in modern times. In the war between Spain and her American colonies, for instance, active hostilities were gradually dropped, and came practically to an end about 1825, though peaceful relations were not formally restored, at any rate with some of the colonies involved, until 1840. What period of suspension is necessary to justify the presumption of the restoration of peace will, of course, depend on the actual circumstances. . . . Where war is terminated by the conquest and absorption of one State by the other, there is, of course, no scope for any formal Treaty of peace; but the close of the war is commonly marked by some formal proclamation or announcement on the part of the conqueror, or by some formal act of surrender, on behalf of the inhabitants. So, in the South African War, the annexation of the Orange Free State was proclaimed on the 24th of May, 1900, and that of the South African Republic on the 1st of September, 1900; but these announcements were really premature,

¹¹ See N. J. Padelford, "International Law and the Spanish Civil War," 31 *A.J.I.L.* (1937), 226; V. A. O'Rourke, "Recognition of Belligerency and the Spanish War," *ibid.*, 398. On recognition of belligerency and insurgency, see §§ 32, 33.

and the actual termination of the war must be referred to the agreement of surrender made at Vereeniging on the 31st of May, 1902. Ordinarily, however, the termination of a war is marked by the formal conclusion of a Treaty of peace, which is thereupon notified both to the subjects of the belligerents and to the world at large.¹

The distinction between hostilities and a legal state of war is also important in determining when a war begins and ends. Hostilities during a legal state of war may be terminated by an armistice, but the legal state of war may not end until the entry into force of a treaty of peace. This was the case at the end of the World War. The hostilities ceased with the Armistice of November 11, 1918, but the Treaty of Versailles did not enter into force (terminating the legal wars with Germany) until January 10, 1920. Since the United States did not ratify this Treaty, for it the legal state of war continued to a later date. On July 2, 1921, the President approved a joint resolution of Congress declaring the war at an end.² On August 25, 1921, representatives of the United States and Germany signed the Treaty of Berlin³ and ratifications were exchanged November 11, 1931. The Treaty cited the Congressional joint resolution of July 2, 1921, but made no mention of re-establishing peace in its operative portions. On November 14, 1921, the President issued a Proclamation stating that the war had ended on July 2, 1921, and making public the terms of the Treaty of Berlin.

When did the war end? Hudson says that it ended on different dates for different purposes.⁴

Courts do not ordinarily regard the cessation of hostilities as in itself terminating a war, and it is certain that a considerable time must elapse before a war would be regarded as ending through a mere cessation of hostilities without conquest, surrender, or formal treaty. A United States District Court in 1919 did not regard the Armistice of November 11, 1918, as terminating the war between the United States and Germany. "An armistice effects nothing but a suspension of hostilities; the war still continues." Pending the conclusion of the treaty "which terminates the war," the Court held that the war continued, though admitting that in some cases wars might end through cessation of hostilities or subjugation.⁵ A formal treaty would not seem to be necessary, however, if the intent of the belliger-

¹ *Cases on International Law*, (ed. W. L. Walker, 1937), II, 293-294. By permission of Mr. Walker and Sweet & Maxwell, Ltd., publishers.

² 42 Stat. 105.

³ U.S.T.S. No. 658.

⁴ "The Duration of the War between United States and Germany," 39 *Harvard Law Review* (1926), 1020, 1045.

⁵ *Commercial Cable Co. v. Burleson* (1919), 255 F. 99; declared moot in 250 U. S. (1919) 360.

ents to have peace is in some way officially declared. Thus the Lithuanian Supreme Court in 1929 accepted a declaration by the Lithuanian Delegation before the Council of the League of Nations that Lithuania considered herself to be no longer in a state of war with Poland, as terminating the juridical state of war which had previously existed between the two States without acts of war being committed. The Lithuanian declaration of December, 1927, was taken note of by the League Council and embodied in a Resolution of December 10.⁶

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⁶ *In re Zabita*, reported in *Annual Digest*, 1929-1930, p. 491.

See Coleman Phillipson, *Termination of War and Treaties of Peace* (1916); E. S. Corwin, "The Power of Congress to Declare Peace," 18 *Michigan Law Review* (1920), 669; J. M. Mathews, "The Termination of War," 19 *Michigan Law Review* (1921), 819.

QUESTIONS AND PROBLEMS

Students are urged to read all the materials in the chapter before attempting to work out the questions and problems.

1. Read carefully the list of wars in § 138.

(a) States A, B, and C are allies, as are also States X, Y, and Z. War is declared by State A on State Z. Does this create a war between States B and C and State Z? Between States B and C and States X and Y? Explain.

(b) Suppose the treaty of alliance between States A, B, and C reads that in case any one of them is involved in war the others will regard themselves as at war with the enemy of the member of the alliance concerned. War is declared by State A against State Y. There are no other declarations of war. Does war exist between States B and C against State Y?

(c) Suppose a "general war" of States A, B, and C, against States X, Y, and Z. How many wars are there?

(d) Suppose, in this "general war," State B makes peace with State X. Does this stop the "general war?" Explain. Suppose a peace treaty is entered into between States A, B, C, Y, and Z. What is then the legal situation?

In what sense is the term "World War," as applied to the conflict beginning in 1914, accurate?

2. What were the essential facts in *The Prize Cases* (§ 139)? What precise issues were presented by these facts? How were these issues decided?

Was it necessary for the Court to discuss the question of whether a state of war existed between the United States and the Confederate States? What did the Court decide on this point? Had there been any declaration of war? What difference did this make, in the Court's judgment? Were the Confederate States a sovereign State? Was their Government recognized by the United States? What difference did these facts make, in the Court's judgment? Under the Constitution of the United States, was there a war? What difference did this fact make, in the Court's judgment?

How did the Court deal with the proclamation of blockade by the President? Did the Court think that such action by the President could be questioned in the courts? Comment on the statement: "The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed, which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case."

Did the Court think that neutrals were bound by this blockade? Did the Court cite any evidence which would support its view? Had any power declared its neutrality? Could there be any neutrals if there was no war? Do you think that if another State had recognized the existence of war between the United States and the Confederate States, it would be in a position to object if either of these exercised the ordinary right of blockade according to international law?

3. What differences were there in the disposition of the different ships and cargoes in *The Prize Cases* (§ 139)? Can you explain these differences?

4. In *The Prize Cases* (§ 139) how does the Court define war? What do you think of this definition? Compare it with the following: "War is the relation which exists between states or between political entities when there may lawfully

be what Gentilis in 1588 defined as 'a properly conducted contest of armed public forces.' " G. G. Wilson, *International Law*, 8th Ed. (1922), p. 235.

5. Can war exist in the material sense when it does not exist in the legal sense? Explain your answer, giving examples if possible.

Can war exist in the legal sense when it does not exist in the material sense? Explain your answer, giving examples if possible.

Are any documents in preceding chapters of importance in dealing with this question?

6. What is the importance of *Hague Convention (III) Relative to the Opening of Hostilities* (§ 140)? Is it to be regarded as a statement of the law existing in 1907 or as new law? Give reasons for your answer. Does Article 1 apply to all uses of force? Compare it in this respect with the provisions of Article 16 of the *Covenant of the League of Nations*.

7. Does Article 1 of *Hague Convention (III) Relative to the Opening of Hostilities* (§ 140) refer to war in the material or in the legal sense, or both? Explain your answer and its significance. Answer the same questions with respect to Article 2.

8. Suppose that States A, B, C, and D are parties to Hague Convention (III) (§ 140). A dispute has arisen between States A and B which is in process of diplomatic settlement, seeming to lead to no result. At this moment cruisers of State A at widely separated points capture merchant vessels of the registry of State B. State B sends a note to State A saying that State A has violated the Convention, in consequence of which State B will, unless State A offers restoration and apology, recognize the state of war thrust upon it by State A. State A refuses restoration and apology.

(a) Do the acts of the cruisers of State A create a state of war?

(b) Do the acts of the cruisers constitute violations of the Hague Convention?

(c) Does the note of State B initiate a state of war?

(d) Is the note of State B in accordance with the Hague Convention?

(e) Does refusal of restoration and apology initiate a state of war?

(f) Is it necessary to the existence of a state of war that States A and B agree that they are at war?

(g) Could State C, after the capture of the ships of State B, but before the despatch of State B's note, legally issue a proclamation of neutrality?

(h) Could State D, after the despatch of State B's note, legally issue a proclamation of neutrality?

(i) At what stage in these events could a cruiser of State A visit, search, and seize a vessel of State E for carriage of contraband of war? Would it make any difference if State E had not been notified under the terms of Article 2 of the Convention?

(j) Upon what date could the war between States A and B be considered to begin? Might the declaration be retroactive? In the light of your answer to this question, discuss the rights of States C, D, and E.

9. In the State of Graustark, there occurs a military revolt which establishes *de facto* control over about half the area of the country, but not the capital. On different and successive dates: (a) the revolutionaries seize the government radio station and announce that they are in control of the country; (b) government

news despatches admit widespread insurrection; (c) government arms the populace; (d) government declares rebellious troops guilty of treason; (e) revolutionaries establish a junta "exercising all the powers of the State of Graustark"; (f) fighting begins in many parts of Graustark; (g) government declares martial law; (h) government declares it will "wage war" on the rebels; (i) government announces it will treat prisoners as prisoners of war; (j) government notifies outside States that certain Graustarkian ports are subject to blockade; (k) government vessel captures a ship of State X running the blockade; (l) six outside States refuse to recognize blockade.

Is there a legal war? If so, on which of these dates did it begin?

XV

Effects of War on Normal Relations between Belligerents

§ 142. EFFECT OF WAR ON TREATIES BETWEEN BELLIGERENTS

Techt v. Hughes

UNITED STATES, COURT OF APPEALS OF NEW YORK, 1920

229 N. Y. 222.

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 30, 1920, affirming an interlocutory judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action for partition of real property.

The following question was certified: "Has the plaintiff herein an estate of inheritance in the real property sought to be partitioned in this action?"

[Argument of counsel omitted.]

CARDOZO, J.: James J. Hannigan, a citizen of the United States, died intestate on December 27, 1917, seized in fee simple of real estate in the city of New York. Two daughters, the plaintiff, Sara E. Techt, and the defendant, Elizabeth L. Hughes, survived him. In November, 1911, the plaintiff became the wife of Frederick E. Techt, a resident of the United States, but a citizen of Austria-Hungary. On December 7, 1917, twenty days before the death of plaintiff's father, war was declared between Austria-Hungary and the United States. The record contains a concession that neither the plaintiff nor her husband has been interned, nor has the loyalty of either been questioned by the government of state or nation, and that both, remaining residents of the United States, have kept the peace and obeyed

the laws. The plaintiff's capacity on December 27, 1917, to acquire title by descent is the question to be determined.

The rule at common law was that aliens might take lands by purchase, and hold until office found, but could take nothing by descent. (*Martin v. Hunter's Lessee*, 1 Wheat. 304; *Hauenstein v. Lynham*, 100 U. S. 483; *Haley v. Sheridan*, 190 N. Y. 331; 2 Kent's Comm. 54).

"If an alien could acquire a permanent property in lands, he must owe an allegiance equally permanent with that property to the King of England, which would probably be inconsistent with that which he owes to his own natural liege lord, besides that thereby the realm might in time be subject to foreign influence, and feel many other inconveniences" (1 Blackstone, Comm. 372). Blackstone was repeating the explanation which was already traditional in his day. Inheritance by aliens, says Coke (*Calvin's Case*, 4 Co. Rep. 1, 19), would "tend to the destruction of the realm." And if it be demanded "wherein doth that destruction consist," his answer is: "first, it tends to destruction *tempore belli*; for then strangers might fortify themselves in the heart of the realm and be ready to set fire on the commonwealth," for all which he finds example and warning in the legend of the Trojan horse. Artificial and far-fetched may seem to-day this defense of the policy of the rule. We may even doubt whether it is sound in history (1 Pollock & Maitland's History of English Law, 445). That is little to the point. The rule, whatever its origin, is inveterate and undoubted. It survives to-day except as statute or treaty may have abrogated or changed it.

The plaintiff is undisputably an alien. Congress has enacted that "any American woman who marries a foreigner shall take the nationality of her husband" (Act of March 2, 1907, Ch. 2534, 34 Stat. 1229). . . . She is without capacity to inherit unless statute or treaty has removed the disability.

Both statute and treaty are invoked in her behalf. The statute says that: "A citizen of the United States is capable of holding real property within this state, and of taking the same by descent, devise or purchase," and that "alien friends are empowered to take, hold, transmit and dispose of real property within this state in the same manner as native-born citizens, and their heirs and devisees take in the same manner as citizens" (Real Prop. Law, Sec. 10, as amended by L. 1913, Ch. 152; Consol. Laws, chap. 50). Alien enemies, therefore, have such rights, and such only, as were theirs at common law. The treaty says that "where, on the death of any person holding real property, or property not personal, within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of two years to sell the same; which term may be reasonably prolonged, according to circumstances; and to withdraw the proceeds thereof,

without molestation, and exempt from any other charges than those which may be imposed in like cases upon the inhabitants of the country from which such proceeds may be withdrawn" (Art. II of Convention between United States and Austria, concluded May 8, 1848, and proclaimed October 25, 1850; 9 Stat. 944, extending the stipulations of the treaty of Commerce and Navigation, concluded August 27, 1829, and proclaimed February 10, 1831, 8 Stat. 398).

Statute and treaty will be separately considered.

(1) If the plaintiff's capacity to inherit depended solely on the statute, I should feel constrained to hold against her. I cannot follow the Appellate Division in its view that she is in law an "alien friend." [An elaborate examination of authorities is omitted.]

(2) The support of the statute failing, there remains the question of the treaty. The treaty, if in force, is the supreme law of the land (U. S. Const. Art. 6) and supersedes all local laws inconsistent with its terms (*Hauenstein v. Lynham*, 100 U. S. 483; *Geofroy v. Riggs*, 133 U. S. 258; *Chirac v. Chirac*, 2 Wheat. 259; *Kull v. Kull*, 37 Hun, 476). Judicial construction has already fixed its meaning. (*Kull v. Kull*, *supra*; *Bollerman v. Blake*, 24 Hun, 187; 94 N. Y. 624; *Stamm v. Bostwick*, 40 Hun, 35, 37, *Hauenstein v. Lynham*, *supra*; *Scharpf v. Schmidt*, 172 Ill. 255; *Wunderle v. Wunderle*, 144 Ill. 40; *Fischer v. Sklenar*, 101 Neb. 553.) The right which it secures is in form a right of sale. In substance, it is a right of ownership. The fee descends, subject to the condition that it shall be disposed of within the "term of two years, which term may be reasonably prolonged according to circumstances" (*Kull v. Kull*, *supra*). We do not need to determine the effect of a breach of the condition. In this instance there was none. Judgment of partition and sale was entered within the term of two years. The plaintiff has an estate of inheritance, if the treaty is in force (*Scharpf v. Schmidt*, *supra*; *Kull v. Kull*, *supra*).

The effect of war upon the existing treaties of belligerents is one of the unsettled problems of the law. The older writers sometimes said that treaties ended *ipso facto* when war came. (3 Phillimore Int. L. 794). The writers of our own time reject these sweeping statements. (2 Oppenheim, Int. L. sec. 99; Hall, Int. L. 398, 401; Fiore, Int. L. [Borchard's Transl.] sec. 845). International law to-day does not preserve treaties or annul them, regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of war exact. It establishes standards, but does not fetter itself with rules. When it attempts to do more, it finds that there is neither unanimity of opinion nor uniformity of practice. "The whole question remains as yet unsettled." (Oppenheim, *supra*). This does not mean, of course, that there are not some classes of treaties about which there is general agreement. Treaties of alliance fall. Treaties of boundary or

cession, "dispositive" or "transitory" conventions, survive. (Hall, Int. L. pp. 398, 401; 2 Westlake, Int. L. II, 34; Oppenheim, *supra*). So, of course, do treaties which regulate the conduct of hostilities. (Hall, *supra*; 5 Moore, Dig. Int. L. 372; *Society for Propagation of the Gospel v. Town of New Haven*, 8 Wheat. 464, 494).

Intention in such circumstances is clear. These instances do not represent distinct and final principles. They are illustrations of the same principle. They are applications of a standard. When I ask what that principle or standard is, and endeavor to extract it from the long chapters in the books, I get this, and nothing more: that provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected. "Treaties lose their efficacy in war only if their execution is incompatible with war. *Les traités ne perdent leur efficacité en temps de guerre que si leur exécution est incompatible avec la guerre elle-même.*" (Bluntschli, Droit International Codifié, sec. 538). That in substance was Kent's view, here as often in advance of the thought of his day. "All those duties, of which the exercise is not necessarily suspended by the war, subsist in their full force. The obligation of keeping faith is so far from ceasing in time of war, that its efficacy becomes increased, from the increased necessity of it." (1 Kent, Comm. p. 176).

That, also, more recently, is the conclusion embodied by the Institute of International Law in the rules voted at Christiania in 1912, which defined the effects of war on International Conventions. In these rules, some classes of treaties are dealt with specially and apart. Treaties of alliance, those which establish a protectorate or a sphere of influence, and generally treaties of a political nature, are, it is said, dissolved. Dissolved, too, are treaties which have relation to the cause of war. But the general principle is declared that treaties which it is reasonably practicable to execute after the outbreak of hostilities must be observed then, as in the past. The belligerents are at liberty to disregard them only to the extent and for the time required by the necessities of war.

"Les traités restés en vigueur et dont l'exécution demeure, malgré les hostilités, pratiquement possible, doivent être observés comme par le passé. Les Etats belligérants ne peuvent s'en dispenser que dans la mesure et pour le temps commandés par les nécessités de la guerre." (Institut de droit international, annuaire 1912, p. 648; Scott, Resolutions of the Institute of Int. Law, p. 172. Cf. Hall, Int. Law [7th ed.], 399; 2 Westlake Int. L. p. 35; 2 Oppenheim, Int. L. sec. 99, 276).

This, I think, is the principle which must guide the judicial department of the government when called upon to determine during the progress of a war whether a treaty shall be observed, in the absence of some declaration by the political departments of the government that it has been suspended

or annulled. A treaty has a twofold aspect. In its primary operation, it is a compact between independent states. In its secondary operation, it is a source of private rights for individuals within states. (*Head Money Cases*, 112 U. S. 580, 598). Granting that the termination of the compact involves the termination of the rights, it does not follow, because there is a privilege to rescind, that the privilege has been exercised. The question is not what states *may* do after war has supervened, and this without breach of their duty as members of the society of nations. The question is what courts are to presume that they have done.

"Where the department authorized to annul a voidable treaty shall deem it most conducive to the national interest that it should longer continue to be obeyed and observed, no right can be incident to the judiciary to declare it void in a single instance." (JAY, C. J., in *Jones v. Walker*, 2 Paine, 688, 701. Cf. *The Legal Nature of Treaties*, vol. 10, *American Journal of Int. Law* [1916,] pp. 721, 722).

President and Senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts. (*Fong Yue Ting v. U. S.*, 149 U. S. 698.) The treaty of peace itself may set up new relations, and terminate earlier compacts, either tacitly or expressly. The proposed treaties with Germany and Austria give the victorious powers the privilege of choosing the treaties which are to be kept in force or abrogated. But until some one of these things is done, until some one of these events occurs, while war is still flagrant, and the will of the political departments of the government unrevealed, the courts, as I view their function, play a humbler and more cautious part. It is not for them to denounce treaties generally *en bloc*. Their part it is, as one provision or another is involved in some actual controversy before them, to determine whether, alone, or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace. The mere fact that other portions of the treaty are suspended, or even abrogated, is not conclusive. The treaty does not fall in its entirety unless it has the character of an indivisible act.

"*Le traité tombe pour le tout quand il présente le caractère d'un acte indivisible.*" (Rules of the Institute of Int. L., *supra*).

To determine whether it has this character, it is not enough to consider its name or label. No general formula suffices. We must consult in each case the nature and purpose of the specific articles involved.

"*Il faut . . . examiner dans chaque cas, si la guerre constituée par sa nature même un obstacle à l'exécution du traité.*" (Bluntschli, *supra*).

I find nothing incompatible with the policy of the government, with the safety of the nation, or with the maintenance of the war in the enforce-

ment of this treaty, so as to sustain the plaintiff's title. We do not confiscate the lands or goods of the stranger within our gates. If we permit him to remain, he is free during good behavior to buy property and sell it. (Trading with Enemy Act Oct. 6, 1917, 40 S. 411, ch. 106). He is to be "undisturbed in the peaceful pursuit" of his life and occupation, and "accorded the consideration due to all peaceful and law-abiding persons." (President's Proclamation of December 11, 1917). If we require him to depart, we assure to him, for the recovery, disposal and removal of his goods and effects and for his departure, the full time stipulated by any treaty then in force between the United States and the hostile nation of which he is a subject; and where no such treaty is in force, such time as may be declared by the President to be consistent with the public safety and the dictates of humanity and national hospitality. (U. S. R. S. sec. 4068, re-enacting the act of July 6, 1798). A public policy not outraged by purchase will not be outraged by inheritance.

The plaintiff is a resident; but even if she were a nonresident, and were within the hostile territory, the policy of the nation would not divest her of the title whether acquired before the war or later. Custody would then be assumed by the Alien Property Custodian. The proceeds of the property, in the event of sale, would be kept within the jurisdiction. Title, however, would be unchanged, in default of the later exercise by Congress of the power of confiscation (40 Stat. ch. 106, pp. 416, 424), now seldom brought into play in the practice of enlightened nations (2 Westlake, Int. L. 46, 47; *Brown v. U. S.*, 8 Cranch 110). Since the argument of this appeal, Congress has already directed, in advance of any treaty of peace, that property in the hands of the Custodian shall be returned in certain classes of cases to its owners, and in particular where the owner is a woman who at the time of her marriage was a native-born citizen of the United States and prior to April 6, 1917, intermarried with a subject or citizen of Germany or Austria-Hungary. (Act of June 5, 1920, amending sec. 9 of the Act of Oct. 6, 1917). It follows that, even in its application to aliens in hostile territory, the maintenance of this treaty is in harmony with the nation's policy and consistent with the nation's welfare. To the extent that there is conflict between the treaty and the statute (40 Stat. ch. 106), we have the same situation that arises whenever there is an implied repeal of one law by another. To the extent that they are in harmony, both are still in force.

There is in truth no conflict here, except in points of detail. In fundamental principle and purpose, the treaty remains untouched by later legislation. In keeping it alive we uphold the policy of the nation, revealed in acts of Congress and proclamations of the President, "to conduct ourselves as belligerents in a high spirit of right and fairness" (President Wilson's Address to the Congress of April 2, 1917; Scott, Diplomatic Correspondence

between United States and Germany, p. 324), without hatred of race and without taint of self-seeking.

I do not overlook the statements which may be found here and there in the works of authors of distinction (Hall, *supra*; Halleck, Int. L. [4th Ed.] 314; Wheaton, Int. L. [5th Ed.] 377) that treaties of commerce and navigation are to be ranked in the class of treaties which war abrogates or at least suspends. Commerce is friendly intercourse. Friendly intercourse between nations is impossible in war. Therefore treaties regulating such intercourse are not operative in war. But stipulations do not touch commerce because they happen to be embodied in a treaty which is styled one to regulate or encourage commerce. We must be on our guard against being misled by labels. Bluntschli's warning, already quoted, reminds us that the nature and not the name of covenants determines whether they shall be disregarded or observed. There is a line of division fundamental in importance, which separates stipulations touching commerce *between* nations from those touching the tenure of land *within* the territories of nations. (Cf. the Convention "as to tenure and disposition of real and personal property" between the United States and Great Britain, dated March 2, 1899).

Restrictions upon ownership of land by aliens have a history all their own, unrelated altogether to restrictions upon trade. (*Kershaw v. Kelsey, supra*; *Fairfax v. Hunter, supra*). When removed, they cease to exist for enemies as well as friends, unless the statute removing them enforces a distinction. (*Kershaw v. Kelsey, Fairfax v. Hunter, supra*). More than that, the removal, when effected by treaty, gives reciprocal privileges to the subjects of each state, and is thus of value to one side as much as to the other. For this reason, the inference is a strong one, as was pointed out by the Master of the Rolls in *Sutton v. Sutton* (1 Russ. & M. 664, 675), that the privileges, unless expressly revoked, are intended to endure. (Cf. 2 Westlake, p. 33; also Halleck, Int. L. *supra*). There, as in *Society for Propagation of the Gospel v. Town of New Haven*, (8 Wheat. 464, 494,) the treaty of 1794 between the United States and England, protecting the citizens of each in the enjoyment of their landed property, was held not to have been abrogated by the war of 1812. Undoubtedly there is a distinction between those cases and this, in that there the rights had become vested before the outbreak of the war. None the less, alike in reasoning and in conclusion, they have their value and significance. If stipulations governing the tenure of land survive the stress of war, though contained in a treaty which is described as one of amity, it is not perceived why they may not also survive, though contained in a treaty which is described as one of commerce. In preserving the right of inheritance for citizens of Austria when the land inherited is here, we preserve the same right for our citizens when the land inherited is there. (*Brown v. U. S.*, 8 Cranch, 110, 129). Congress has not yet commanded us,

and the exigencies of war, as I view them, do not constrain us, to throw these benefits away.

No one can study the vague and wavering statements of treaties and decision in this field of international law with any feeling of assurance at the end that he has chosen the right path. One looks in vain either for uniformity of doctrine or for scientific accuracy of exposition. There are wise cautions for the statesman. There are few precepts for the judge. All the more, in this uncertainty, I am impelled to the belief that, until the political departments have acted, the courts, in refusing to give effect to treaties, should limit their refusal to the needs of the occasion; that they are not bound by any rigid formula to nullify the whole or nothing; and that, in determining whether this treaty survived the coming of war, they are free to make choice of the conclusion which shall seem the most in keeping with the traditions of the law, the policy of the statutes, the dictates of fair dealing, and the honor of the nation.

The judgment should be affirmed with costs, and the question certified answered in the affirmative.

HISCOCK, C.J., and CHASE, HOGAN, McLAUGHLIN, and CRANE, JJ., concur; ELKUS, J., concurs in result.

Judgment affirmed.

§ 143. EFFECT OF WAR ON TREATIES BETWEEN BELLIGERENTS (*Continued*)

NOTE BY THE EDITOR

Article 35 of the Draft Convention on the Law of Treaties of the Harvard Law School Research in International Law provides as follows:

(a) A treaty which expressly provides that the obligations stipulated are to be performed in time of war between two or more of the parties, or which by reason of its nature and purpose was manifestly intended by the parties to be operative in time of war between two or more of them, is not terminated or suspended by the beginning of a war between two or more of the parties.

(b) Unless otherwise provided in the treaty itself, a treaty which does not expressly provide that the obligations stipulated are to be performed in time of war between two or more of the parties, and which by reason of its nature and purpose was not manifestly intended by the parties to be operative in time of war between two or more of them, is suspended as between the hostile belligerents during the continuance of a war between two or more of the parties, and unless contrary provision is made at the conclusion of the war, it will again come into operation when the state of war is ended.

(c) The preceding paragraphs of this Article may apply *mutatis mutandis*

to separate parts of a treaty, if such parts are clearly independent of other parts of the treaty.¹

For extended comment on the problem, see Comment on Harvard Draft, 29 *A.J.I.L.* (*Supp.*, October, 1935), 1183-1204; Rühland, "Zur Theorie und Praxis des Einflusses des Kriegsbeginns auf Staatsverträge," 32 *Niemeyer's Zeitschrift für Internationales Recht* (1924), 74; Tobin, *Termination of Multipartite Treaties* (1933), p. 22; Hurst, "The Effect of War on Treaties," 2 *B.Y.I.L.* (1921-22), 38; N. Politis, "Effets de la Guerre sur les Obligations Internationales," 24 *Annuaire de l'Institut de Droit International* (1911), 208; Moore, *Digest*, V, 381 ff. See also *Society for the Propagation of the Gospel v. New Haven* (1823) 8 Wheaton 464 (treaties stipulating for permanent rights suspended only); *Karnuth v. U. S.* (1929) 279 U. S. 231 (abrogation by War of 1812 of right of free passage across United States-Canadian border guaranteed by Jay Treaty of 1794). *Établissement Coullerez c. Maison Stein*, 53 *J. D. I.* (1926), 604 is a French case holding that the Hague Convention of 1905 on Civil Procedure was only suspended during the World War. For German decisions to the same effect, see Kusters and Bellemans, *Les Conventions de la Haye de 1902 et 1905 sur le Droit International Privé* (1921), p. 1156. Italian courts held that a Hague Convention of 1902 relating to divorce was not suspended by the World War but remained in effect. *Domini v. Kenk*, Kusters and Bellemans, *op. cit.*, 493.

The German Reichsgericht held in 1925 that treaties of commerce of 1894 and 1904 between Germany and Russia had lost their force on the outbreak of war. *Entscheidungen des Reichsgericht in Zivilsachen*, III, 40.

With respect to multipartite treaties, Tobin states the accepted view: "Subject to numerous exceptions . . . multipartite conventions may be said to be generally suspended so far as they concern direct relations between belligerents, but to remain unaffected where neutrals are involved."²

§ 144. STATUS OF ENEMY ALIENS IN THE COURTS

Porter v. Freudenberg ✓ ✓

GREAT BRITAIN, COURT OF APPEAL, 1915

[1915] 1 K. B. 857.

APPEAL of the plaintiff from an order made at chambers by Scrutton, J. giving leave to issue a concurrent writ against the defendant, an alien enemy, and to serve notice of it upon the defendant at Berlin.

The action was brought to recover a quarter's rent due on September 29,

¹ 29 *A.J.I.L.* (*Supp.*, October, 1935), 664-665.

² *Termination of Multipartite Treaties* (1933), p. 22.

1914, under a lease made in 1903, at a rental of £625, of certain premises in Princes Street, Hanover Square. The defendant resided and carried on business as a mantle manufacturer at Berlin, in the Empire of Germany, and had for some time before the outbreak of the war carried on a branch establishment at the above premises by means of an agent named Arthur Barnes. According to the plaintiff's affidavit, a quantity of stock was usually kept on the premises, but immediately before September 29, 1914, the whole of the stock, fixtures, and fittings was removed from the premises. On September 28 the keys of the premises were sent to the plaintiff by Barnes, and the plaintiff intimated that they would be held at the disposal of Barnes as the agent of the defendant. . . .

[Argument of counsel omitted.]

LORD READING, C. J.: . . . The main questions to be considered are, first, the capacity of alien enemies to sue in the King's Courts; secondly, their liability to be sued; thirdly, their capacity to appeal to the Appellate Courts, and, generally, their right to appear and be heard in the King's Courts. . . .

In ascertaining the rights of aliens the first point for consideration is whether they are alien friends or alien enemies. Alien friends have long since been, and are at the present day, treated in reference to civil rights as if they were British subjects, and are entitled to the enjoyment of all personal rights of a citizen, including the right to sue in the King's Courts. Alien enemies have no civil rights or privileges unless they are here under the protection and by permission of the Crown: Blackstone, 21st ed., vol. 1, c. 10, p. 372. [An extended examination of cases in support of these propositions is omitted.]

In Walford's treatise on the Law respecting Parties to Actions, published 1842, there is a chapter in vol. 1, p. 647, dealing with disabilities of civil origin which well repays close and diligent study. When treating of alien enemies the learned author at page 650 thus states the law: "Alien enemies are distinguishable according as they are under the King's special protection or not. If an alien enemy came here under a safe conduct or is commorant here by the King's licence under his protection he seems to stand in the same position as to the right of maintaining actions in our courts as an alien friend, a right of suing being an incidental right to protection"—that is, he is no longer under the disability attaching to an alien enemy.

Whenever the capacity of an alien enemy to sue or proceed in our Courts has come up for consideration, the authorities agree that he cannot enforce his civil rights and cannot sue or proceed in the civil Courts of the realm. [The Court's discussion of *Ex parte Boussmaker*, 13 Ves. 71, and *Princess Thurn and Taxis v. Moffit*, (1914) 31 Times L. R. 24, is omitted.]

Having stated the common law of England in regard to the question of

the alien enemy's right to sue in our Courts of law, we have now to consider whether the Hague Convention of 1907 upon the Laws and Customs of War on Land, article 23 (h) of chapter 1 of section 2 of the Annex entitled "Regulations respecting the Laws and Customs of War on Land," has any bearing upon the questions we have to determine. The heading of that section is "Of Hostilities." Section 3 is headed "Military Authority over the Territory of a Hostile State."

Chapter 1 of section 2 is entitled "The Means of Injuring the Enemy; Sieges and Bombardments." The articles in it are numbered from 22 to 28. . . . [The opinion here reproduces the whole of Articles 22 and 23. See below, § 154, at page 762.]

The important paragraph is 23 (h) :—"To declare abolished, suspended or inadmissible the right of subjects of the hostile party to institute legal proceedings. . . ."

Extending our view from the paragraph itself to the immediate context, we find that it is included in a group of paragraphs forming article 23, every other of which relates solely to the conduct of a military force and its commanders in a campaign and not at all to the administration of the law respecting alien enemies at home; that the chapter of which the article forms part is entitled "Means of Injuring the Enemy; Sieges and Bombardments," and that the section of the Annex to which the chapter belongs bears the general heading "Of Hostilities." Extending our view still further to the Convention itself, we find the declaration which governs the whole Annex and controls its application in article 1: "The contracting powers *will issue to their armed land forces instructions which shall be in conformity with the 'regulations respecting the laws and customs of war on land' annexed to the present Convention.*"

It is impossible to suppose that this means (as it must do if the effect of the paragraph (h) is to abrogate the law existing hitherto in England and to give an alien enemy the position of a *persona standi in judicio* in English Courts of law) that the War Office of Great Britain shall in the present war for this purpose issue instructions to Sir John French, commanding our land forces in the field, forbidding him to "declare" that the rights of alien enemies—Germans, Austrians, or Turks—to institute legal proceedings in the High Court of Justice in London are suspended or inadmissible. And yet this absurdity seems necessarily to follow from the scheme of the Convention as applied to paragraph (h) if the interpretation of this paragraph is that which is contended for by those who find in it an abrogation of our law, which hitherto has not given to an alien enemy the position of a *persona standi in judicio*.

Our view is that article 23 (h), read with the governing article 1 of the Convention, has a very different and very important effect, and that the

paragraph, if so understood, is quite properly placed as it is placed in a group of prohibitions relating to the conduct of an army and its commander in the field. . . .

Having now explained the meaning of "alien enemy" for civil purposes, and having decided that such alien enemy's right to sue or proceed either by himself or by any person on his behalf in the King's Courts is suspended during the progress of hostilities and until after peace is restored (see also *Flindt v. Waters*, (1812) 15 East, 260), the next point to consider is whether he is liable to be sued in the King's Courts during the war. To allow an alien enemy to sue or proceed during war in the civil Courts of the King would be, as we have seen, to give to the enemy the advantage of enforcing his rights by the assistance of the King with whom he is at war. But to allow the alien enemy to be sued or proceeded against during war is to permit subjects of the King or alien friends to enforce their rights with the assistance of the King against the enemy. Prima facie there seems no possible reason why our law should decree an immunity during hostilities to the alien enemy against the payment of just debts or demands due to British or neutral subjects. The rule of law suspending the alien enemy's right of action is based upon public policy, but no considerations of public policy are apparent which would justify preventing the enforcement by a British or neutral subject of a right against the enemy. As was said by Bailhache J. in *Robinson & Co. v. Continental Insurance Co. of Mannheim*, (1915) 1 K. B. 155, at page 159: "to hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy and to defeat the object and reason of the suspensory rule." In our judgment the effect would be to convert that which during war is a disability, imposed upon the alien enemy because of his hostile character, into a relief to him during the war from the discharge of his liabilities to British subjects. It is very noteworthy that when dealing with the rights of alien enemies there is no shadow of doubt suggested in the books as to the right to sue alien enemies. More often there is no mention of it, but sometimes it is the subject of express reference and then always to the same effect, that the alien enemy can be sued during the progress of hostilities. Bacon's Abridgment 7th Ed. vol. 1, p. 183, asserts this liability of the alien enemy without doubt or hesitation. "The plea of 'Alien enemy' is a bar to a bill for relief in equity as well as to an action at law, but it would seem not sustainable to a mere bill for discovery for *as an alien enemy may be sued at law* and may have process to compel the appearance of his witnesses so he may have the benefit of a discovery." This is an important passage in other respects also, and in our judgment it is a correct statement of the law. . . .

The Supreme Court of the United States had to consider the position of an alien enemy defendant in *McVeigh v. United States*, 11 Wall. 259. The

United States under a statute then in force filed a libel of information in the District Court of Virginia for the forfeiture of certain real and personal property of McVeigh on the ground that he was "a resident of the city of Richmond within the Confederate lines and a rebel." McVeigh appeared by counsel and filed a claim to the property and an answer. The Attorney of the United States moved that the claim and answer and appearance be stricken from the files, and the Court granted the motion and the decree was made for forfeiture of the property. The case eventually was brought to the Supreme Court on writ of error. Swayne, J., in delivering the judgment of the court, said: "The order in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. . . . Whether the legal status of the plaintiff in error was or was not that of an alien enemy is a point not necessary to consider; because, apart from the views we have expressed, conceding the fact to be so, the consequences assumed would by no means follow. Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defence." The learned judge relied upon the above-mentioned passage in Bacon's Abridgment as an authority for this proposition, and the Supreme Court acted upon it by reversing the judgment of the District Court and of the Circuit Court.

Although there is no case in English law which has directly decided that an alien enemy can be sued in our courts until the recent decision of Bailhache, J., it is instructive to glance at cases dealing with forfeiture of civil rights resulting from some act of misconduct. The traitor, the felon, the outlaw, and the excommunicated person were under civil disabilities. They were held by their misconduct to have wiped out and obliterated the original traces of their character as citizens (see Walford, p. 647). Such misconduct generally speaking carried the same denial of the rights to sue in the courts as attached to an alien enemy. In Noy's Reports (Noy was Attorney General to Charles I) this judicial observation occurs in *Hastings v. Blake*, Noy, 1: "Men attain or outlawed shall be put to answer in any action against them because it is to their prejudice: but in an action brought by them they shall not be answered because it is to their benefit." In *Ramsden v. Macdonald*, 1 Wils. 217, Lee C. J. said: "There is no doubt but a person attainted may be sued." These are not direct authorities to support the proposition now under discussion with reference to alien enemies, but they are instances to show that there is no reason in principle why a person attainted or outlawed should not be sued. . . .

Once the conclusion is reached that the alien enemy can be sued, it fol-

lows that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentment of his defence. If he is brought at the suit of a party before a Court of justice he must have the right of submitting his answer to the Court. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's Courts in the administration of justice.

Equally it seems to result that, when sued, if judgment proceed against him, the appellate Courts are as much open to him as to any other defendant. It is true that he is the person who may be said in one sense to initiate the proceedings in the appellate Court by giving the notice of appeal, which is the first necessary step to bring the case before the court; but he is entitled to have his case decided according to law, and if the judge in one of the King's Courts has erroneously adjudicated upon it he is entitled to have recourse to another and an appellate Court to have the error rectified. Once he is cited to appear he is entitled to the same opportunities of challenging the correctness of the decision of the judge of first instance or other tribunal as any other defendant. The decision in *McVeigh v. United States*, 11 Wall. 259, in the Supreme Court of the United States is to the same effect. In that case the defendant, who was appellant in the circumstances already stated, brought writ of error in respect of the judgments of the District and Circuit Court and succeeded in reversing the judgments of those Courts.

We must now consider whether the same conclusion is reached in reference to appeals by an alien enemy plaintiff, that is, a person who before the outbreak of war was a plaintiff in a suit and then by virtue of his residence or place of business became an alien enemy. As we have seen, he could not proceed with his action during the war. If judgment had been pronounced against him before the war in an action in which he was plaintiff, can he present an appeal to the appellate Courts of the King? We cannot see any distinction in principle between the case of an alien enemy seeking the assistance of the King to enforce a civil right in a Court of first instance and an alien enemy seeking to enforce such right by recourse to the appellate Courts. He is in either case seeking to enforce his right by invoking the assistance of the King in his Courts. He is the "actor" throughout. He is not brought to the Courts at the suit of another; it is he who invokes their assistance; and it matters not for this purpose that a judgment has been pronounced against him before the war. When once hostilities have commenced he cannot, so long as they continue, be heard in any suit or proceeding in which he is the person first setting the Courts in motion. If he had given notice of appeal before the war, the hearing of his appeal must be suspended until after the restoration of peace.

Having now dealt with general principles, we proceed to consider their application to the three appeals before us. The plaintiff in the first appeal

issued a writ against one Philip Freudenberg. . . . The plaintiff having issued his writ applied to Scrutton J. for directions as to the manner of serving it upon the defendant in Berlin. The learned judge gave liberty to the plaintiff to issue a concurrent writ against the defendant and to serve notice of the writ in Berlin. In view of the difficulty of serving the notice of writ on the defendant, Mr. Fitch, on behalf of the plaintiff, asked this court to make an order for substituted service of the notice of writ by allowing service of it upon Barnes or otherwise as the Court might direct. . . .

Unless an order for substituted service in this country of a notice of writ for service out of the jurisdiction can be made in a proper case, great hardship may be inflicted upon persons who are subjects of and resident in this country who have given credit or entered into contractual relations with or have claims against persons who are not alien enemies, to the manifest advantage of the alien enemies and disadvantage of British subjects and subjects of other States who wish to sue in this country. This Court whilst bearing this consideration in mind must also take into account the position of the defendant the alien enemy, who is, according to the fundamental principles of English law, entitled to effective notice of the proceedings against him. It is obvious that in all cases against the alien enemy the plaintiff will seek, if possible, an order to make substituted service in this country. . . .

Upon the materials now before us we think service of the notice should be effected in the one case by substituted service upon Barnes and in the other upon Bonome, and such further terms should be imposed in chambers upon the plaintiff as to advertisement or other means of communication and as to the period to be given to the defendant for appearance as may seem proper. . . .

This is the judgment of the Court.

Order varied in Porter v. Freudenberg. . . .

§ 145. SUITS BY ALIEN ENEMIES

NOTE BY THE EDITOR

States are free under international law to determine whether they will permit alien enemies to sue in their courts. *Porter v. Freudenberg* above represents the insistence of the British courts on the common-law theory that an alien enemy has no standing to sue before the courts; but even in Great Britain the rule was so relaxed during the World War as to lose its practical significance. Thus the old rule that an alien enemy having the safe-conduct of the Crown might sue, *Wells v. Williams* (1697) 1 L. Raym. 282, was expanded to cover the case of an enemy alien who complied with a

compulsory registration order, *Princess Thurn and Taxis v. Moffit* (1915) 1 Ch. 58, and even when enemy aliens were interned, this right was not lost, *Schaffenius v. Goldberg* (1916) 1 K. B. 284. In the United States it was held as early as 1813 that an enemy alien resident in the United States at the outbreak of war might sue even though he did not have an express license to remain; the fact that the President had not ordered him to depart was held to constitute an implied license. *Clark v. Morey*, 10 Johns. (N. Y.) 69. In 1917 the Court of Chancery of New Jersey permitted an alien enemy to sue on the ground that this was the public policy of the United States as declared by a presidential proclamation authorized by Act of Congress, *Posselt v. D'Espard* (1917) 87 N. J. Eq. 571; and this doctrine was applied in the subsequent cases. See note at page 1275 in Hudson's *Cases* (2nd Ed., 1936). Continental States maintained that the effect of Article 23 (h) of Hague Convention IV of 1907 (quoted above in *Porter v. Freudenberg*, at page 720) was to require belligerent States to permit enemy aliens to sue, as a rule of international law. It does not seem too much to say that, despite *Porter v. Freudenberg* and the undoubted freedom of States to forbid access to their courts to alien enemies, the practice of belligerent States now is to permit resident alien enemies to sue.

§ 146. PROPERTY OF ENEMY ALIENS

In re Ferdinand, Ex-Tsar of Bulgaria

GREAT BRITAIN, COURT OF APPEAL, 1920

[1921] 1 Ch. 107.

[Statement of the case and arguments of counsel are omitted.]

1920, July 30. LORD STERNDALE, M. R.: In this case the Ex-Tsar of Bulgaria, who has obtained special leave for the purpose, appeals against two orders made on July 30, 1919, and August 13, 1919, by Eve J. and P. O. Lawrence J. respectively. By each order certain stocks and securities which formerly belonged to the appellant were vested in the Solicitor to the Treasury as trustee for H. M. King George V. The appellant was by birth of German nationality but according to his affidavit in 1887 he had become of Austro-Hungarian nationality by reason of holding a commission in the army of that country. In that year he was elected Prince of Bulgaria and in 1908 he assumed the title of Tsar. On being elected Prince of Bulgaria he became of Bulgarian nationality. War broke out between Bulgaria and this country in October, 1915, and the appellant thereupon became an enemy of His Majesty. At that time the stocks and securities in question were held by Messrs. Coutts & Co. on behalf of the appellant, some of them being registered in his own name and some in the names of partners of Coutts & Co.

who held them as trustees for the appellant. After the outbreak of war Messrs. Coutts & Co., acting in accordance with the provisions of the Trading with the Enemy Amendment Act of 1914, gave notice to the custodian appointed under that act that they so held the said stocks and securities and also some bearer securities not the subject of this appeal. They were required to deposit, and did deposit them with the Bank of England to the order of the Solicitor to the Treasury, and the partners in whose names some of them were registered signed declarations that they held them also to the order of the Treasury. No further step was taken in the matter until after the conclusion of an armistice with Bulgaria and the abdication of the appellant, which took place on September 29, and October 3, 1918, respectively. After his abdication the appellant went to Germany and was resident there at the conclusion of the armistice with Germany on November 11, 1918.

On June 27, 1919, a commission was issued under the Great Seal by virtue of which on July 10, 1919, an inquisition was held by which it was found that the appellant was on the outbreak of war beneficially entitled to the stocks and securities and that the same became and remained forfeited to His Majesty. The orders in question were then made on the dates before mentioned. On November 19, 1919, an order was made by the Board of Trade under s. 4 of the Trading with the Enemy Amendment Act, 1916, vesting the stocks and securities in the custodian, such order only to have effect in case of its being held that no forfeiture of them to His Majesty had taken place.

The points argued on the appeal were: (1) Was it ever the common law of England that the Crown had the right to seize and claim as forfeited to it private property, including choses in action found in this kingdom belonging to subjects of an enemy state? (2) If so, had that right ceased to exist before the passing of the Trading with the Enemy Acts? (3) If not, has it been abandoned or ceased to exist by reason of the legislation contained in the various acts relating to trading with the enemy, so far as such legislation deals with the disposition of enemy property during the war? (4) Had the Crown lost the right to claim the forfeiture of such property, because no inquisition had been held before the conclusion of the armistice with Bulgaria? These stocks and securities were choses in action belonging to the appellant, and I do not think any distinction can be drawn between legal and equitable interests in such choses in action. The stocks and securities were the private property of the appellant and were in no way part of the national revenues or property of the state of Bulgaria. They would no doubt, if the appellant could have obtained possession of them, have been available for use by him in the promotion of the war against this country, but probably he had no intention of so using them, and I think that from the legal point of view they must be considered in the same light as the private prop-

erty of any other national of the enemy state. The fact that they were the property of the enemy sovereign is only important from a moral or political point of view in influencing the crown to enforce the exercise of a right which it has not exercised for a long time, and probably would not have exercised against the property of a private person. I do not therefore think it necessary to discuss the question argued before us as to the position of the appellant as a sovereign under the constitution of Bulgaria, or the extent to which under that constitution he may be considered responsible for the war between this country and Bulgaria.

As to the first two questions I have no doubt that they should be answered against the appellant. I think the right to seize private enemy property existed and that nothing had occurred up to the beginning of the war with Bulgaria to deprive the Crown of that right unless that were the effect of the Trading with the Enemy Acts. The right is stated by Hale C. J. in his Pleas of the Crown to have existed originally, and although it was argued with some force that the cases in the Year Books to which reference is there made do not fully bear out the statement and have been questioned in Rolle's Abridgment, 195, it has been recognized and repeated as a correct statement of the law many times since. It is so stated also by the writers on international law, in Wheaton, 8th Ed. (by Dana), ss. 304-308, and notes 157 and 171; Phillimore, Part III., 132; Kent, Part I., 65; Wheaton, 5th Ed. (by Phillipson), p. 419; and Hall, 7th Ed., pp. 460-464, and the notes to those pages. In Westlake's International Law, Part II., 47, the author after adducing strong arguments to show that such a right should not continue says: "The time is now fully ripe when a British Court should not lag behind the position taken by Governments, but should boldly follow Lord Ellenborough." The allusion of Lord Ellenborough refers to the case of *Wolff v. Oxholm*, 6 M. & S. 92, with which I shall deal later. I have quoted Westlake's words, because they show that although the author strongly condemned the practice of seizing private property he did not consider that the law as then existing prohibited it, and earlier in the same passage he had referred to the decision of Dr. Lushington in *The Johanna Emilie*, Spinks' Prize Cas. 14, where the existence of the right was clearly stated. It was also so held in America in *Brown v. United States* (1814) 8 Cranch, 110, though in the circumstances of that case the court decided that there was no right to seize the goods in question. The only statement to the contrary in a modern writer that I have found is in Oppenheim, vol. II., s. 102, where he says that the right to seize private property is obsolete, and that there is a customary international law prohibiting the confiscation of private property and the annulment of enemy debts on the territory of a belligerent. If this only refers, as I think it does, to a general confiscation and annulment and not to a right in the Crown to seize in particular instances it is not, whether correct or not,

opposed to what I think is the law. If it be intended to extend to the right to seize I think it is opposed to other authorities and incorrect.

Great reliance was however placed by the counsel for the appellant on the case of *Wolff v. Oxholm*, 6 M. & S. 92, to which reference has already been made. In that case a Danish subject ordinarily resident in Denmark was sued for a debt due to the plaintiffs who were carrying on business in England. His defence was that he had during the war between England and Denmark paid the debt to commissioners appointed by the Danish government, by whose order all debts due to English subjects by Danes were sequestrated and made payable to the commissioners. Lord Ellenborough delivering the judgment of the Court of King's Bench in 1817 held the defence bad and the ordinance to be contrary to the law of nations. The actual decision related to a general confiscation of mercantile debts; and Lord Ellenborough referred in his judgment to the protection given to merchants by Magna Charta, but he did use expressions which show that he considered that there was no right to seize any property of an incorporeal nature. This judgment has been the subject of criticism in Wheaton, 8th ed. (by Dana), s. 308, and it is my opinion, if it go to the length contended by the appellant's counsel, opposed to the decision I have already mentioned in *The Johanna Emilie* Spinks' Prize Cas. 14, and also to *Land v. Lord North*, 4 Doug. 266-274, where Lord Mansfield speaks of that *summum jus* which undoubtedly gives all enemies' property coming into this country to the king. In *Furtado v. Rogers*, 3 Bos. & P. 191, also the right to seize property and debts seems to have been recognized by Lord Alvanley, though he does not expressly decide the question. It seems also clear that Lord Ellenborough was in error as to some of the historical facts upon which he relies in his judgment. It is pointed out in Hall's International Law, p. 462, n. 1, that he was incorrect in stating that the ordinance in question "stood single and alone unsupported by any precedent and that no instance of such confiscation except the ordinance in question is to be found for more than a century," and instances are given in that note to the contrary. There were also produced before us in the argument instances of Exchequer special commissions in 1693, 1705, 1797, 1806, 1807 and 1812 under which inquisitions were found forfeiting to the crown private enemy property including choses in action, and in one case at least government securities which would not now be seized. In one case, namely, that of the inquisition held in 1697, the matter came before the court in *Attorney General v. Weeden*, Parker, 267, where it was held that the inquisition was invalid because it was not held until after the conclusion of peace, but this decision was given: "upon long debate it was resolved first that choses in action which belonged to an alien enemy were forfeited to the crown." Lord Ellenborough seems to have been unaware of these inquisitions. I ought perhaps to mention that other inquisi-

tions forfeiting property in 1854 were produced, but I attach no importance to them, because they related to certain steam vessels under construction for the Emperor of all the Russians during the Crimean War. These steam vessels may well have been considered enemy government property which might be used in the war. Taking these matters into consideration I do not think *Wolff v. Oxholm*, displaces the other authorities to which I have referred. [The Court's discussion of *Stevenson v. Cartonnagen-Industrie* (1917) 1 K. B., 852, 857, 869, is omitted.]

The third question raises very different considerations. I doubt whether such a right as in my opinion existed could be lost by mere disuse unless such disuse took place in circumstances which would raise the inference of an international compact, but I think it is quite clear that the Crown can abandon and give up a right if it choose to do so. The question here is whether by the various Acts called Trading with the Enemy Acts it has so abandoned the right. [The Court's recital of the Trading with the Enemy Acts is omitted.] It is fairly clear, I think, that the powers conferred by these acts are in important respects inconsistent with the exercise of the common law right of forfeiture. If an order had been previously made by the Board of Trade vesting the property in the custodian I do not see how the right of forfeiture could be exercised or an inquisition held which could find that the property was enemy property forfeited to the Crown when it was already vested in the custodian to be disposed of according to Order in Council. The powers conferred by the act no doubt afforded a readier and more convenient method of dealing with enemy property than the somewhat cumbrous method of procedure by inquisition, and were therefore useful to the Crown, but I do not think that is the only effect of the act. It seems to me that a power to vest property in a custodian to be dealt with at the end of the war as His Majesty should by Order in Council direct is inconsistent with an intention of preserving a power to insist on an absolute forfeiture at common law. The one contemplates a discretion as to the disposal of the property which would no doubt be affected by the provisions of the treaty of peace, while the other works an absolute forfeiture following the exercise of a right still in existence but unexercised in late years. The right to forfeiture and the Trading with the Enemy legislation are concerned with all enemy property, and it must be remembered that the right to forfeit, although its existence is recognized, has been criticised and its exercise deprecated by practically all writers on international law in modern times. In these circumstances I think that if the Crown in taking powers in many respects inconsistent with that right meant also to preserve it the intention to do so should be clearly shown, and in my opinion that is not the case. Some confirmation of this view, though not perhaps very much, is obtained from s. 14, sub-s. 1, of the Trading with the Enemy (Amendment) Act, 1914. This section contains a

saving of certain powers of His Majesty existing apart from the Act, and does not mention this right of forfeiture.

The conclusion to which I have come seems to be in accordance with the view expressed by Bankes L. J. in *Stevenson v. Cartonnagen-Industrie* (1917) 1 K. B. 852, where he said: "The whole of the legislation which has been passed since the beginning of the war dealing with enemy property in this country rests on the assumption that the Crown is not insisting on any common law right to claim such property."

I think, therefore, that on this ground the appeal should be allowed, and the orders appealed from discharged.

[Opinions of Warrington and Younger, L. JJ., omitted.]

Appeal allowed.¹

§ 147. PROPERTY OF ENEMY ALIENS (*Continued*)

NOTE BY THE EDITOR

In *Brown v. United States*, in 1814, Chief Justice Marshall laid down principles concerning the property of enemy aliens which appear still to be the law, though it had been thought prior to the World War that international practice had come to forbid the confiscation of enemy property.

That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. . . . The proposition that a declaration of war does not, in itself, enact a confiscation of the property of the enemy within the territory of the belligerent, is believed to be entirely free from doubt. . . . It is not an immutable rule of law, but depends on political considerations which may continually vary. Commercial nations, in the situation of the United States, have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy property in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary.^{1a}

¹ "As far as the editor can ascertain, the ex-Tsar Ferdinand's property went out of the frying pan into the fire; that is, instead of being 'forfeited' at common law, it was 'retained' under the Bulgarian Peace Treaty." H. Lauterpacht, in Oppenheim, *International Law*, 5th Ed. (1935), II, 271.—Ed.

^{1a} 8 Cranch 110, 122-123, 127, 128.

Lawrence stated the pre-World War usage as follows:

In modern times the real property of enemy subjects has not been interfered with by the belligerent States in whose territory it was situated, even when the owner resided in their own or neutral States, the one exception being an Act of the Confederate Congress passed in 1861 for the appropriation of all enemy property found within the Confederacy, except public stocks and securities. This proceeding was deemed unwarrantably severe; and contrary usage has been so uniform that we may safely regard the old right to confiscate as having become obsolete through disuse.²

During the war, however, this usage underwent a gradual but effective deterioration. In Great Britain, France, Germany, and the United States, enemy property was at first "sequestered"; that is to say, placed under the administration of government officials with the object partly of seeing that the benefits of alien property ownership did not accrue to the enemy State or nonresident enemy nationals during the war, and with the intent to return it at the war's conclusion. These régimes degenerated into systems of forced sales and liquidations in which the value of enemy properties declined or disappeared. "Both in England and elsewhere," says Sir John Fischer Williams, "the property of enemy subjects was liquidated under legislation confirmed by the Treaties, and the victorious belligerent States were left free to apply the proceeds of liquidation, as if they were assets of the enemy States, towards the settlement of the international obligations arising under the Treaties."³

Under the Treaty of Berlin between the United States and Germany, it was provided that all property of German nationals seized by the United States should be retained until Germany made provision for the satisfaction of the claims of American nationals against Germany. Acts of Congress of 1923 (42 Stat. 1511) and 1928 (45 Stat. 254) made provision for the return of the property seized, but the return has had an unsavory history.⁴ Says Sir John: "It is difficult to agree that the immunity or 'sanctity' of private property is recognised when it is sequestered, liquidated, and used as security for claims against the State of the owner."⁵ Sir John makes a strong argument for the permissibility of seizures of enemy private property on the general ground that war is now totalitarian, not a mere venture of armies and navies in which civilian private property can be immune.⁶ It is hard to believe that

² *International Law*, 7th Ed. (1923), p. 401. By special permission of D. C. Heath and Company.

³ *Chapters on Current International Law and the League of Nations* (1929), pp. 194-195.

⁴ See *Cummings v. Deutsche Bank* (1937), 300 U. S. 115, and E. M. Borchard, "Reprisals on Private Property," 30 *A.J.I.L.* (1936), 108, and "Confiscations: Extraterritorial and Domestic," 31 *A.J.I.L.* (1937), 675, at 678 ff.

⁵ Williams, *op. cit.*, 195.

⁶ *Ibid.*, Chap. VIII.

future practice will return to the rule of inviolability believed to have been established prior to the World War.⁷

§ 148. STATUS OF ENEMY MERCHANT SHIPS AT THE OUTBREAK OF HOSTILITIES

Convention (VI) Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities

SIGNED AT THE HAGUE, OCTOBER 18, 1907¹

Text from Scott, *Hague Conventions and Declarations of 1899 and 1907*, pp. 141-142.

[Names of parties, preamble, and names of plenipotentiaries omitted.]

ARTICLE 1. When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.

The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out.

ART. 2. A merchant ship unable, owing to circumstances of *force majeure*, to leave the enemy port within the period contemplated in the above article, or which was not allowed to leave, can not be confiscated.

The belligerent may only detain it, without payment of compensation, but subject to the obligation of restoring it after the war, or requisition it on payment of compensation.

ART. 3. Enemy merchant ships which left their last port of departure before the commencement of the war, and are encountered on the high seas while still ignorant of the outbreak of hostilities can not be confiscated. They are only liable to detention on the understanding that they shall be restored after the war without compensation, or to be requisitioned, or even

⁷ For opinion insisting on this rule see J. B. Moore, *International Law and Some Current Illusions* (1924), pp. 4, 5, 13-25; E. M. Borchard, "Enemy Private Property," 18 *A.J.I.L.* (1924), 523; "The Settlement of War Claims Act of 1928," 22 *A.J.I.L.* (1928), 373. See also Sir John Fischer Williams, "Jurisdiction to Confiscate Debts," 36 *Harvard Law Review* (1923), 960; E. Turlington, "Treatment of Enemy Property in the United States before the World War," 22 *A.J.I.L.* (1928), 270.

¹ The following States have ratified or adhered to this Convention: Austria (deposited ratification October 25, 1937), Austria-Hungary, Belgium, Brazil, China (May 10, 1917), Cuba, Denmark, El Salvador, Ethiopia (adhered August 5, 1935), France, Germany (with reservation), Great Britain (ratified November 27, 1909, but denounced November 14, 1925), Guatemala, Haiti, Japan, Liberia, Luxemburg, Mexico, Netherlands, Nicaragua, Norway, Panama, Poland (1935), Portugal, Roumania, Russia (with reservation), Siam, Spain, Sweden, Switzerland. The United States did not sign, ratify, or adhere to this Convention. (As of August, 1939.)

destroyed, on payment of compensation, but in such cases provision must be made for the safety of the persons on board as well as the security of the ship's papers.

After touching at a port in their own country or at a neutral port, these ships are subject to the laws and customs of maritime war.

ART. 4. Enemy cargo on board the vessels referred to in articles 1 and 2 is likewise liable to be detained and restored after the termination of the war without payment of compensation, or to be requisitioned on payment of compensation, with or without the ship.

The same rule applies in the case of cargo on board the vessels referred to in article 3.

ART. 5. The present Convention does not affect merchant ships whose build shows that they are intended for conversion into war-ships.

ART. 6. The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention.

[Articles 7-11 and the signatures are omitted.]

§ 149. STATUS OF ENEMY MERCHANT SHIPS AT THE OUT- BREAK OF HOSTILITIES (*Continued*)

NOTE BY THE EDITOR

The rule of Article 1 of this Convention (if rule it may be called) grew out of a practice originating in the Crimean War. Prior to 1854 it was permissible for States to confiscate enemy merchantmen in their ports at the outbreak of war, and even to embargo them, with ultimate confiscation, if war broke out while the war was still only impending (see § 125). In *Littlejohn v. United States* (1926) 270 U. S. 215, it is stated that international law still permits confiscation unless there is a treaty to the contrary.

The practice of permitting days of grace, begun in the Crimean War of 1854, was followed in the Franco-Prussian War of 1870, the Russo-Turkish War of 1877, the Spanish-American War of 1898, and the Russo-Japanese War of 1904. There was no uniformity, however, in the length of the period (thus the United States granted thirty days in 1898, while Russia granted forty-eight hours in 1904); nor had any rule of reciprocity developed; nor was there any agreement on such related questions as to whether a ship having left during the period of grace could be subsequently captured on the high seas.

During the World War of 1914 the Convention was not binding on any belligerent. Serbia, whose war with Austria-Hungary was the first to begin, on July 28, 1914, signed but did not ratify the Convention, and this,

under its Article 6, prevented its taking effect in any of the other wars. The practice varied: some States granted days of grace and some did not. Thus, while France granted a period of seven days to ships of Austro-Hungarian and German registry (all these States having ratified the Convention), Great Britain, failing to receive satisfactory assurances from Germany as to reciprocity, did not grant days of grace. All these States had ratified the Convention. Garner states that "the United States, China, Cuba, Italy, and Uruguay appear not to have accorded any days of grace . . . ;"¹ but also that "it does not appear that in any case was an embargo laid in anticipation of the war upon merchant vessels in port prior to the outbreak of the war."² A statement from Lauterpacht's *Oppenheim* may conclude the discussion. "During the World War many parties to this Convention failed to observe it, and accordingly Great Britain, regarding reciprocity and a high degree of uniformity of practice as essential to its continuance, gave notice in 1925 to the Netherlands Government, in pursuance of Article 10, of the denunciation of the whole Convention (VI). Accordingly, in the future, the law administered in a British Prize Court will be the law which was in operation before the ratification of Hague Convention VI; namely, that enemy merchant-ships in British ports on the outbreak of war, or encountered at sea even while still ignorant of the outbreak of war, are liable to capture and to condemnation as prize. It is improbable that the practice . . . of giving days of grace to enemy merchant-ships in port which was initiated during the Crimean War will continue to grow and harden into law; at present, at any rate, it is not a rule of International Law."³

§ 150. TRADING WITH THE ENEMY

Kershaw v. Kelsey

UNITED STATES, SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1868

100 Mass. 561.

GRAY, J.: The defendant, a citizen of Massachusetts, in February 1864, in Mississippi, took from the plaintiff, then and ever since a citizen and resident of Mississippi, a lease for one year of a cotton plantation in that state, and therein agreed to pay a rent of ten thousand dollars, half in cash, and half "out of the first part of the cotton crop, which is to be fitted for market in reasonable time." The lessor also agreed to deliver, and the lessee to receive and pay the value of, the corn then on the plantation. It does

¹ *International Law and the World War* (1920), I, 156.

² *Ibid.*, p. 154.

³ *International Law*, 5th Ed., II, 276. By permission of Longmans, Green & Co.

not appear whether the defendant went into Mississippi before or after the beginning of the war of the rebellion; and there is no evidence of any intent on the part of either party to violate or evade the laws, or oppose or injure the government of the United States. The defendant paid the first instalment of rent, took possession of the plantation and corn, used the corn on the plantation, provided it with supplies to the amount of about five thousand dollars, and planted and sowed it, but early in March was driven away by rebel soldiers, and never returned to the plantation, except once in April following, after which he came back to Massachusetts. The plaintiff continued to reside on the plantation, raised a crop of cotton there, and delivered it in Mississippi to the defendant's son, by whom it was forwarded in the autumn of the same year to the defendant; and he sold it and retained the profits, amounting to nearly ten thousand dollars.

The plaintiff sues for the unpaid instalment of rent and the value of the corn. The claims made in the other counts of the declaration have been negated by the special findings of the jury.

The defendant, in his answer, denied all the plaintiff's allegations; and at the trial contended that the lease, having been made during the civil war, was illegal and void, as well by the principles of international law, as by the terms of the act of Congress of 1861, c. 3, § 5, and the proclamations issued by the President under that act, declaring "all commercial intercourse by and between" the State of Mississippi and other states in which the insurrection existed "and the citizens thereof, and the citizens of the rest of the United States," to be unlawful, so long as such condition of hostility should continue, and that "all goods and chattels, wares and merchandise," coming from such states into other parts of the United States, or proceeding to such states by land or water, together with the vessel or vehicle conveying them, or conveying persons to or from such states, without the license of the President, should be forfeited to the United States. 12 U. S. Sts. at Large, 257, 1262, 13 Ib. 731.

The judge presiding at the trial ruled that the contracts sued on were legal, and the jury having returned a verdict for the plaintiff, the question of the correctness of this ruling is reported for our decision; the parties agreeing that, if the ruling was correct, the case shall be sent to an assessor; but if incorrect, judgment shall be entered for the defendant.

This case presents a very interesting question, requiring for its decision a consideration of fundamental principles of international law. It is universally admitted that the law of nations prohibits all commercial intercourse between belligerents, without a license from the sovereign. Some *dicta* of eminent judges and learned commentators would extend this prohibition to all contracts whatever. In a matter of such grave importance, the safest way of arriving at a right result will be to examine with care the principal

adjudications upon the subject, most of which were cited in the argument. [An elaborate exposition of the English and American authorities is omitted.]

The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection; as well as any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been carried by judicial decision. The more sweeping statements in the text books are taken from the *dicta* which we have already examined, and in none of them is any other example given than those just mentioned. At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war.

The trading or transmission of property or money which is prohibited by international law is from or to one of the countries at war. An alien enemy residing in this country may contract and sue like a citizen. 2 Kent Com. 63. When a creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the amount of the debt, throughout the war, payment there to such creditor or his agent can in no respect be construed into a violation of the duties imposed by a state of war upon the debtor; it is not made to an enemy, in contemplation of international or municipal law; and it is no objection that the agent may possibly remit the money to his principal in the enemy's country; if he should do so, the offence would be imputable to him, and not to the person paying him the money. *Conn. v. Penn*, Pet. C. C. 496. *Deniston v. Imbrie*, 3 Wash. C. C. 396. *Ward v. Smith*, 7 Wallace 447; *Buchanan v. Curry*, 19 Johns. 137. The same reasons cover an agreement made in the enemy's territory to pay money there out of funds accruing there and not agreed to be transmitted from within our own territory; for, as was said by the supreme court of New York in the case last cited, "the rule is founded in public policy, which forbids, during war, that money or other resources shall be transferred so as to aid or strengthen our enemies. The crime consists in exporting the money or property, or placing it in the power of the enemy." . . .

The lease now in question was made within the rebel territory, where both parties were at the time, and would seem to have contemplated the continued residence of the lessee upon the demised premises throughout the term; the rent was in part paid on the spot, and the residue, now sued for, was to be paid out of the produce of the land; and the corn, the value of which is sought to be recovered in this action, was delivered and used thereon. No agreement appears to have been made as part of or contemporaneously with the lease, that the cotton crop should be transported, or the rent sent back, across the line between the belligerents; and no contract or communication appears to have been made across that line, relating to the lease, the delivery of possession of the premises or of the corn, or the payment of the rent of the one or the value of the other. The subsequent forwarding of the cotton by the defendant's son from Mississippi to Massachusetts may have been unlawful; but that cannot affect the validity of the agreements contained in the lease. Neither of these agreements involved or contemplated the transmission of money or property, or other communication, between the enemy's territory and our own. We are therefore unanimously of opinion that they did not contravene the law of nations or the public acts of the government, even if the plantation was within the enemy's lines; and that the plaintiff, upon the case reported, is entitled to recover the unpaid rent, and the value of the corn. . . .

Judgment for the plaintiff; case referred to an assessor.

§ 151. TRADING WITH THE ENEMY (*Continued*)

Sutherland, Alien Property Custodian, v. Mayer

SUPREME COURT OF THE UNITED STATES, 1926

271 U. S. 272.

Appeals from a decree of the Circuit Court of Appeals which affirmed in part and reversed in part a decree of the District Court, in a suit brought by the Alien Property Custodian for an accounting of assets, part in the United States and part in Germany, which appertained to a partnership existing on the declaration of war.

[Argument of counsel omitted.]

Mr. JUSTICE SUTHERLAND delivered the opinion of the court.

These are several appeals from a decree of the court below affirming in part and reversing in part a decree of the federal District Court for the District of Massachusetts. The suit was brought by the Alien Property Custodian against Richard Mayer, a naturalized citizen of the United States, two corporations, organized under Massachusetts law, Karl B. Strauss,

a naturalized subject of Great Britain, and Edwin Reis and Anny Reis, in her own right as widow and as trustee for two minor children of Ludwig Reis, deceased, citizens and inhabitants of Germany, for an accounting in respect of the interest of Mayer and the German citizens in certain assets in the United States in Mayer's possession and assets in Germany in the possession of the Germans, alleged to belong to a partnership consisting of Mayer, Edwin Reis, Karl B. Strauss and Ludwig Reis.

The partnership was formed some time prior to the declaration of war against Germany on April 6, 1917, and was existing at that time. Mayer contributed to the partnership his American business, worth slightly over 206,000 marks—less than \$50,000. The German partners contributed about 2,655,000 marks. By the partnership agreement, after payment of 4½ per cent on the capital contributed and stipulated salaries, Mayer was to receive 20 per cent of the profits, to be credited to his capital account. The partnership agreement was made in Germany, and the principal seat of the partnership was at Friedrichsfeld, Germany, with branches at Manchester, England, and in Boston. At the time of the declaration of war, the partnership assets in Mayer's possession had grown to a little over \$910,000, and his share in the European assets amounted to 2,414,056.12 marks. Of the amount in Mayer's possession, between \$500,000 and \$600,000 consisted of a balance remaining out of \$2,500,000 sent to him by the German partners for the purpose of buying cotton waste.

After the declaration of war, the American assets were seized by the Alien Property Custodian; but in a suit brought against that officer they were ordered redelivered to Mayer upon the ground that he had a lien upon them for his share of the partnership capital and profits. *Mayer v. Garvan*, 270 Fed. 229, affirmed 278 Fed. 27. The value of the assets returned to Mayer was \$828,072.72, losses having occurred which are not material to the present consideration.

In that case the court held that under the partnership agreement Mayer was entitled upon distribution to have out of the assets of the partnership the amount of his capital investment together with 20 per cent of the net profits earned by the partnership, and was liable for 20 per cent of all losses. There was, however, no evidence of the actual value of the American property or of the German or English property, nor of the liabilities of the firm; and this suit for an accounting followed. It is not disputed that the custodian is entitled to the American assets after deducting therefrom the amount of Mayer's share in all the assets.

The German partners entered an appearance in the present suit and produced at the hearing all the account books. The property in Manchester had been seized by the English government and sold, leaving debts on account of the English branch, amounting to £35,000, which were either

paid or assumed by the German partners. The District Court found that a few days prior to the declaration of war the value of the German mark in the currency of the United States, according to the rate of exchange then quoted, was about 18 cents. Thereafter no rate of exchange was quoted until July 17, 1919, at which time the exchange value of the German mark was 7 7/8 cents. Thereafter, its value steadily declined, until at the time of the act of Congress declaring the state of war at an end on July 2, 1921, it was 1.35 cents; and when the hearing was begun in the present case its value was .0048 of a dollar. The District Court determined that the German partners should account for Mayer's share of the German assets at their value on April 6, 1917, the American assets to be measured in terms of the American gold dollar, and the German assets correspondingly in terms of the German gold mark, which is equivalent of 23.82 cents of the money of the United States; and upon this basis the decree was entered. The Circuit Court of Appeals, in affirming the decree, adopted the same view. *Miller v. Mayer*, 1 Fed. (2d) 419. And this presents the principal question in the case and the only one requiring extended consideration.

Appellants in Nos. 232 and 234 unite in the contention that the declaration of war did not affect the title to the partnership property; that although the partnership was thereby dissolved the partners must suffer ratably from any depreciation in the value of the German assets after the dissolution and before the accounting; and that the accounting must be made upon the basis of the value of such assets at the time of the accounting, the value of the mark being taken at its then rate of exchange.

That the declaration of a state of war immediately effected a dissolution of the partnership is well settled and is not in dispute. It is likewise settled that during the war all intercourse, correspondence and traffic between citizens of this country and of Germany, which would or might be to the advantage of the enemy, were absolutely forbidden. *Conrad v. Waples*, 96 U. S. 279, 287; *Briggs v. United States*, 143 U. S. 346, 353. The effect of War Trade Regulations No. 802, July 14, 1919, and No. 814, July 20, 1919, we shall consider further along.

The reasons for, and the limitations upon, the rule have been frequently stated. War between nations is war between their individual citizens. All intercourse inconsistent with a condition of hostility is interdicted, *The Rapid*, 8 Cr. 155, 162-163, for fear that it may give aid or comfort to, or add to the resources of, the enemy. Moreover, as said by this court in *United States v. Lane*, 8 Wall. 185, 195, "If commercial intercourse were allowable, it would oftentimes be used as a color for intercourse of an entirely different character; and in such a case the mischievous consequences that would ensue can be readily foreseen."

But war is abnormal and exceptional; and, while the supreme necessi-

ties which it imposes require that, in many respects, the rules which govern the relations of the respective citizens of the belligerent powers in time of peace must be modified or entirely put aside, there is no tendency in our day at least to extend them to results clearly beyond the need and the duration of the need. The purpose of the restriction is not arbitrarily and unnecessarily to tie the hands of the individuals concerned, but to preclude the possibility of aid or comfort, direct or indirect, to the opposing forces. It is that purpose which gives birth to the rule and indicates its limits. The rule is simply "a belligerent's weapon of self-protection." *Daimler Co. v. Continental Tyre, etc., Co.*, [1916] 2 A. C. 307, 344. And it applies even where the trading is with a loyal citizen, if he be resident in the enemy's country, since the result of his action may be to furnish resources to the enemy. *Id.*, 319; *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484, 505. The whole tendency of modern law and practice is to soften the "ancient severities of war," and to recognize, increasingly, that the normal interrelations of the citizens of the respective belligerents are not to be interfered with when such interference is unnecessary to the successful prosecution of war. Private rights and duties are affected by war only so far as they are incompatible with the rights of war. See, generally, *Kershaw v. Kelsey*, 100 Mass. 561, 568-574, where the question is elaborately reviewed in an opinion by Mr. Justice Gray which has several times received the approval of this court; *Briggs v. United States*, *supra*, p. 353; *Williams v. Paine*, 169 U. S. 55, 72; *Birge-Forbes Co. v. Heye*, 251 U. S. 317, 323.

Thus, where a contract has been performed before the advent of war and nothing remains but the payment of money, the right to collect is not destroyed, but only the remedy suspended until the termination of the war. *Hanger v. Abbott*, 6 Wall. 532, 537; *Brown v. United States*, 8 Cranch 110, 123; *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 31; *Crutcher v. Hord and wife*, 67 Ky. 360, 366; *Mutual Benefit Life Ins. Co. v. Hillyard*, 37 N. J. L. 444, 465. Agencies, created before the war, and not requiring intercourse across the enemy's frontier, such as for the collection of debts, preservation of property, and so forth, are not terminated by war. See, generally, *Ward v. Smith*, 7 Wall. 447, 452-453; *Quigley's Case*, 13 Ct. Cl. 367, 371; *Anderson v. Bank*, 1 Fed. Cases 838, No. 354; *Lamar v. Micou*, 112 U. S. 452, 464. And in the case of contracts made before the war for the delivery of goods, it is entirely lawful to make delivery during the war within the United States. The thing forbidden is placing property or money within the power of the enemy, "not in delivering it to an alien enemy, or his agent, *residing here*, under the control of our own government. . . . In such a case, the interests of commerce are perfectly compatible with the rights of war; and public policy does not forbid the transfer." *Buchanan v. Curry*, 19 Johns. 137, 141.

And so here, we have to deal, not with a contract made during the war or requiring commercial or other intercourse across military lines, but with an adjustment of rights, after the restoration of peace, under lawful articles of partnership entered into before, and existing at the outbreak of, the war. The advent of a state of war put an end to the partnership and postponed all remedies relating to the dissolution; but it did not petrify rights and duties resulting therefrom. Its effect only was to suspend the enforcement of the obligation of each of the partners in respect of the assets and past transactions of the partnership; and the essential inquiry now is: What was the obligation which resulted from the dissolution?

Upon the dissolution of a partnership, the general rule is that the liquidating partner or partners must settle up the partnership affairs within a reasonable time and, after payment of the partnership debts and liabilities, divide the proceeds among the partners according to their interests. *Clay v. Field*, 138 U. S. 464, 473. The rule is not different because the dissolution is the result of war. *Stevenson & Sons v. Aktiengesellschaft, etc.*, [1918] A. C. 239, 246. But in the case of such a dissolution, in the absence of legislation to the contrary, a settlement is legally impossible until the close of the war, because of the rule forbidding intercourse across the enemy's frontier and denying access by enemy citizens to our courts; although it is entirely compatible with the rule to recognize the right and duty of the enemy partners to care for and preserve the assets of the co-partnership in the possession of each for their mutual benefit when the war has ended. To say otherwise, because an enemy may realize a benefit after the war has come to an end, is utterly to misapply the principle upon which the non-intercourse rule is based and to confound the suspension of the remedy with the loss of the right.

"The prohibition against doing anything for the benefit of an enemy contemplates his benefit during the war and not the possible advantage he may gain when peace comes." *Daimler Co. v. Continental Tyre, etc., Co.*, *supra*, page 347; *Stevenson & Sons v. Aktiengesellschaft, etc.*, *supra*, pp. 249, 253, 254.

In the present case, the adjustment of the account as among the partners is a matter in which the government—the war and the exigencies of the war having passed—is no longer concerned, save as its rights and duties are represented by the Alien Property Custodian. Except for the latter consideration, we are dealing with a simple suit for an accounting among partners, to be determined by the application of equitable principles. *Stevenson & Sons v. Aktiengesellschaft, etc.*, *supra*, page 248. The effect upon these principles of the dissolution of the partnership by the war is certainly no greater than if it had been dissolved by death or agreement. *Buchanan v. Curry*, *supra*, pp. 142-143. In either event the relation created by

the dissolution in respect of the assets is a fiduciary relation, and adjustments of rights and liabilities of the partners *inter se* are to be made in accordance with the rules governing such relationships; and in a court of equity the American partner, *ipso facto*, has no such exceptional privilege as will permit him to secure more favorable consideration than that to be accorded to his alien partners.

The argument for Mayer is that the German partners should be treated as having purchased the German assets on April 6, 1917, and compelled to account for Mayer's interest therein upon that basis and as of that date. In support of that contention we are referred to the record in the original case of *Mayer v. Garvan*, *supra*, of which the District Court in the present case took judicial notice. That record has not been before us; but we accept the statements contained in Mayer's brief in respect of its disclosures, since they do not seem to be challenged by the other parties. We are of opinion, however, that they fall short of establishing a situation for applying the theory of a purchase of the German assets by the German partners.

Undoubtedly, the German partners, instead of liquidating, continued to use the assets after the dissolution in a going business, commingling old assets with new. Also, they took in a new partner. The Court of Appeals said, and evidence is quoted from the Garvan record to the effect, that the assets were taken over by the German partners and thereafter treated as their own. The evidence before us in the present record is to the effect that the business in Germany was carried on during the war as it had been before; that Mayer's share of the profits was credited to him annually in the private ledger at Friedrichsfeld; and that a sum sufficient to pay out Mayer's capital interest, as shown by the books, was continuously carried on deposit in banks.

Precisely what are the facts in respect of this matter we need not stop to determine, because, in view of the conclusion we have reached, it is not material whether the German partners treated the business as their own or as that of the old partnership. The partnership was at an end; and their duty was to liquidate. They could not carry on the business in any form so as to bind Mayer. But Mayer must elect either to accept what was actually done, with the burdens and benefits, or to enforce against his German partners a liability based upon what they should have done. The decision below and Mayer's attitude apparently proceed upon the latter alternative, and in that view, in an ordinary case, he could justly be given no more than what he would have obtained if the liquidation had in fact been made within a reasonable time and the amount of his share promptly paid over to him. Precisely at this point, the contention in Mayer's behalf breaks down, for it ignores the circumstance, which differentiates this from the ordinary case, that, even if the assets had been promptly liquidated, nothing could have

been paid to Mayer until after the removal or expiration of the non-intercourse bar. Until that time, the amount coming to Mayer necessarily would have been held by the German partners in the form of German currency, or of securities or a bank account payable in such currency, and the loss, so far as Mayer is concerned, would have resulted none the less.

In this connection the fact may not be disregarded that the German partners dealt with a situation under the abnormal restraints and perplexities of war; and it is fair to interpret what they did in the light of that situation. So viewed, we are unable to conclude that their acts were hostile to Mayer's ultimate rights or inconsistent with an honest effort to do the best possible thing with the property until the close of the war, utilizing it, in the meantime, in a way which they conceived to be to the best advantage of all concerned. It is clear that no loss was sustained by the continuance of the business; but, on the contrary, there was an asset gain. The great loss, which finally resulted, and which was little short of being complete, was due entirely to the depreciation in the value of the German mark and not to any lack of care or good faith on their part. Moreover, with the exception of plant and machinery, relatively of small value, the German assets during the entire time were in the form of German paper currency or securities, bills receivable, etc., convertible only into German paper currency, since there was no gold in circulation and the paper currency was by German law legal tender.

In whatever aspect the case is viewed or upon whatever basis the liability of the German partners be made to rest, the loss, in the final analysis, was an ineluctable consequence of the war. Is it to be borne by them alone or to be shared equally by all the partners as a common misfortune beyond the power of any of them to turn aside? That question justly cannot be solved by a strict enforcement of the ordinary rule as in ordinary cases, for here we are dealing with extraordinary and anomalous conditions, as a result of which money values were swept away by immense causes as much beyond the sway of the German partners as of Mayer. Blame for such a situation rests upon neither; and equality is equity.

This would appear more clearly if there were no American assets and the German assets were alone concerned. In that event, a decree compelling the German partners to account to Mayer upon the basis of the full value of these assets at the outbreak of the war in terms of gold, notwithstanding the destructive force of these unavoidable circumstances, would be so obviously harsh and inequitable as to shock the conscience of the Chancellor. But the equities are not different because Mayer chances also to have in his possession partnership assets—the greater part of which, it may be said in passing, had been sent to him by the German partners for trade purposes—which, by

reason of the more fortunate state of American finances, has preserved their original monetary value.

[The Court's discussion of *Clay v. Field*, 138 U. S. 464, is omitted.]

Here the case for the German partners, if anything, is stronger; for during the non-intercourse period, there never was a time when, so far as appears, Mayer's share could have been converted into anything but German marks, or when it was legally possible to pay the amount to Mayer. As soon as the non-intercourse restrictions ceased to be operative, however, such payment became lawful, and an obligation arose on the part of the German partners to make it, since Mayer's share, long prior to that time, had been identified and was separable from the body of the assets. It was, in effect, a trust fund, in respect of which the German partners then owed the duty of prompt settlement. The war was formally declared to be at an end by the Act of July 2, 1921; but the right of commercial intercourse and of communication between citizens of this country and Germany was restored by the War Trade Board regulation of July 14, 1919, as amended July 20, 1919. We, therefore, conclude that the German partners should be charged with the amount of Mayer's share of the German assets at the exchange value of the German mark on July 14, 1919. The evidence in the record shows that on July 17th, three days later, the exchange value was 7 $\frac{7}{8}$ cents, which seems near enough to the designated date. The depreciation of the German mark was so great that to compute its American monetary value on a nominal par basis would be to indulge in a pure fiction; and exchange values must be resorted to as the only available method of measurement. The conclusion that the exchange value of marks in American money is to be taken as of the time when commercial intercourse, and, therefore, settlement, first became lawful, rather than at the time of the accounting, finds support, by analogy, in many decisions. See, for example, *Hicks v. Guinness*, 269 U. S. 71, 80; *S. S. Celia v. S. S. Volturro*, [1921] 2 A. C. 544; *In re British American Continental Bank*, [1922] 2 Ch. 575; *Société des Hôtels v. Cumming*, [1921] 3 K. B. 459; *Di Ferdinando v. Simon, Smits & Co.*, [1920] 3 K. B. 409; *Lebeauvin v. Crispin*, [1920] 2 K. B. 714.

In fixing the date upon which exchange should be calculated, the inevitable delay which must result before a judicial taking of the account must be given weight. If the liability be treated as having crystallized at the time indicated above, then a definite date is fixed for the ascertainment of exchange and the amount when found may be awarded without regard to the fluctuations in the possible date of accounting.

The District Court held that it was impossible to calculate the profits which should be equitably assigned to Mayer's share in the German assets, and that, since there could be no payment to him during the period of non-intercourse, interest could not be allowed him upon such share—applying

the rule laid down in *Brown v. Hiatts*, 15 Wall. 177. But the question there arose in respect of a debt which became payable during the progress of the Civil War, and the court held that, since the debt could not be paid until the termination of the war, interest upon it could not be exacted. Here we are not dealing with the question of interest upon a debt, or really with interest at all except as a term of convenience; but with that of an allowance in lieu of unascertainable profits, to which the rule in the Hiatts Case has no application. *Stevenson & Sons v. Aktiengesellschaft, etc.*, *supra*, p. 256. An award should have been made to Mayer calculated upon the basis of interest in lieu of profits.

Decree reversed.

§ 152. TRADING WITH THE ENEMY (*Concluded*)

NOTE BY THE EDITOR

Says Garner:

As to the effect of war upon commercial relations and intercourse generally between the inhabitants of opposing belligerent states international law lays down no rules. The whole matter is therefore left to be regulated by the municipal law of each State concerned. In practice two rules are followed. According to the usual practice of continental European States the outbreak of war does not *ipso facto* render illegal trade with persons in enemy territory. Such trade is therefore regarded as legitimate until it has been expressly forbidden by municipal legislation. . . . According to the common law of England, on the other hand, all commercial intercourse with the enemy or with persons residing in enemy territory, even though they be British subjects, becomes illegal *ipso facto* by the outbreak of war, and no express legislation is necessary to establish its illegality. Engaging in such trade is unlawful except in so far as it is authorized by municipal legislation.¹

However, since under both rules as above stated it is open to legislation of the belligerents either to interdict trade with the enemy or to permit it, the statement of Oppenheim must be taken as central: "States being sovereign, and the outbreak of war bringing the peaceful relations between belligerents to an end, it is within the competence of every State to enact by its Municipal Law such rules as it pleases concerning intercourse and especially trading, between its own and enemy subjects."² During the World War, Great Britain, France, Germany, and the United States prohibited trading with the enemy in varying though similar terms.³ Sometimes it is

¹ Garner, *International Law and the World War* (1920), I, 208-209. By permission of Longmans, Green & Co.

² *International Law* (Ed. Lauterpacht, 1935), II, 263.

³ See Garner, *op. cit.*, Vol. I, Chap. VIII.

advantageous to permit a limited trade with the enemy; under the English common-law rule the sovereign may license such trade.⁴

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⁴ *Usparicha v. Noble*, 13 East 332 (1811).

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QUESTIONS AND PROBLEMS

1. What were the facts presented to the Court in *Techt v. Hughes* (§ 142)? What were the precise questions which the Court was called on to decide? How did it decide these questions?

Was Mrs. Techt an alien or a citizen? Had her status changed? What dates are important in this connection? Of what significance is the citizenship or alienage of Mrs. Techt? Would it have made any difference in the case if Mrs. Techt's father had died a month earlier?

What was the rule of the common law as to the capacity of aliens to inherit? Why does the Court discuss this rule? Was the statute discussed by the Court a statute of Congress or of the legislature of New York? What did the statute provide? What would Mrs. Techt's rights have been if common law and the statute had been the only elements in the case?

What were the provisions of the treaty between the United States and Austria of importance to this case? Did these provisions specifically relate to inheritances during a state of war? If there had been no war, what would Mrs. Techt's rights have been under the treaty?

State why the question whether the war had terminated these provisions of the treaty was important. Did the Court think the war had terminated them? Did the Court think its judgment on this point was the expression of a settled and general principle of international law? Did the Court cite examples of treaties which terminate automatically on the outbreak of war? Of treaties which continue to be effective during war? Of treaties which come into operation at the beginning of a war? What is the "pragmatic" test applied by the Court? What do you think of this test?

Might the United States have declared that the outbreak of war operated to terminate the treaty? Had the United States done this? Would there be any difference in the attitudes which the Court would take in the two cases? What is the role of a Court in a case like this one?

Why does the Court examine the general public policy of the United States? What was this policy, and in what was it expressed? What effect did it have, in the Court's judgment, on the effect of the treaty as applied to the case of Mrs. Techt?

Does the Court think that the general title or character of a treaty should govern courts in determining whether the outbreak of war terminates particular provisions in them?

Why should any treaties be terminated by the outbreak of war? Do these reasons apply in cases involving the ownership of land by enemy aliens? What is the opinion of the Court on this point? Do you think the distinction is well taken?

Taken as a whole, do you think this judgment limits or extends the dislocation created by a state of war?

2. States A and B are at war. What is the effect of the outbreak of war upon the following treaties, ratified by both States in peacetime?

(a) The *Declaration of London* (§ 181; deals with blockade, contraband of war, and so on).

(b) A treaty by which State A ceded an island to State B.

(c) An extradition treaty.

(d) A treaty providing that the ports of each should always be open to the citizens of the other on the terms accorded to the most-favored nation.

(e) The *Covenant of the League of Nations* (§ 115).

(f) A treaty providing that the citizens of each might buy or lease lands in the territories of the other, to be used for purposes of agriculture, on the same terms as those accorded to citizens of the other.

(g) A treaty in which State B agreed to remain neutral if State A were attacked.

(h) A treaty establishing the boundary between A and B.

(i) A treaty by which, in certain territory sold by State B to State A, the inhabitants were to become nationals of State A.

(j) *Hague Convention (IV) Respecting the Laws and Customs of War on Land* (§ 154).

3. At the conclusion of a war between them, States X and Y enter into a treaty under which certain territories are ceded to State X. The land being largely undeveloped, State X parcels it out among many small holders, giving them complete titles under the law of State X. Subsequently, after a lapse of twenty-five years, war again breaks out between the two States, at the conclusion of which State X by treaty cedes the same territories to State Y. Nothing is said in the treaty concerning the landholders; but soon after its conclusion State Y enacts a law dispossessing all of them.

States X and Y submit the matter to arbitration, during which State Y contends that the second war abrogated the treaty ending the first war, and thus invalidated all rights acquired as a consequence of the first treaty. Give your decision and reasons.

4. What were the facts in the case of *Porter v. Freudenberg* (§ 144)? What issues were presented by these facts? How were these issues decided?

What is the distinction between alien friends and alien enemies? May alien friends sue in the courts? Alien enemies? What is the significance of the distinction between an alien enemy and an alien enemy under the King's protection? Suppose an alien enemy were interned in a camp: could he sue in the courts? What is the reason for the incapacity of the alien enemy? Does it continue after the termination of the war?

What is the bearing of the *Regulations Respecting the Laws and Customs of War on Land* (§ 154) in this case? Do you think the Court's treatment of these Regulations was correct?

Do the same principles guide the Court in its judgment on whether an alien enemy can be sued? May an alien enemy be sued? What is the reasoning of the Court on this point? Describe and comment on the case of *McVeigh v. United States*.

Once the liability of an alien enemy to suit is granted, does the alien enemy acquire any rights from this fact?

What are the rights of an alien plaintiff who, judgment having gone against him, seeks to appeal after the outbreak of war? Reasons? What are his rights at the termination of the war?

5. What were the facts in the case of *Ferdinand, ex-Tsar of Bulgaria* (§ 146)? What were the precise questions the Court was called on to decide? What was the Court's judgment?

Did the Court treat the property of Ferdinand as that of a sovereign or as that of a Bulgarian national? Discuss.

What is the central problem dealt with by the Court in this case? Is the property of enemy aliens confiscable on the outbreak of war under the common law? Is it necessarily confiscated at the outbreak of war? Does the Court seem to think the tendency is towards, or away from, such confiscation?

What was the character of the Trading with the Enemy Acts? Did they result in confiscation? Were they to be considered by the Court as exercising the common-law right of the Crown?

What part was played in the discussion by the fact that the inquisition was not held until after the termination of the war?

Would you judge that the effect of the Court's decision is one which encourages the confiscation of the property of enemy aliens? Does it deny that the power exists to confiscate such property?

Discuss *Wolff v. Oxholm* and compare its result with that in this case.

6. Is the *Convention (VI) Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities* (§ 148) applicable in cases in which there is not a legal war? Is it applicable in a war in which States A and B are at war with States C and D, D not being a party to the Convention? Explain your answers.

7. War breaks out between States P and Q, both parties to Hague Convention (VI) (§ 148). How could the following situations be legally dealt with?

(a) State P allows ten days of grace, State Q only five. During the fourth day after the outbreak of war, a merchant vessel of State P registry comes into a port of State Q disabled by a hurricane.

(b) After the outbreak of war, a submarine of State Q encounters at sea a merchant vessel of State P. The papers of the radio officer on the vessel show continuous reception of all messages from State P's Admiralty, with the exception of all messages sent out by the Admiralty having reference to the war.

(c) The same submarine later encounters another vessel of State P registry, which has just left a port of State O.

(d) The same submarine later takes into a port of State Q a merchant vessel of State P registry which is built of unusually heavy armor plate.

(e) How would the cargoes be legally disposed of in the above situations?

8. What were the facts in the case of *Kershaw v. Kelsey* (§ 150)?

What were the precise issues presented by these facts? How did the Court decide them?

Where was the contract made in this case? Between what parties? How was the contract carried out? Why was it contended that such a transaction was illegal?

According to the Court, what kind of commercial relations are forbidden between nationals of the contending belligerents during a war? Was the transaction here of this character? Discuss. Enumerate some illegal transactions.

Do you think that, in the whole state of facts presented to the Court, forbidden trade existed? Explain. Reconcile your answer with the opinion of the Court.

9. What were the facts in the case of *Sutherland v. Mayer* (§ 151)? What issues were presented by these facts? How did the Court decide them?

What was the original partnership agreement between Mayer and the German partners? Had any questions arisen after the war with respect to the assets of the partnership in the United States? How had these questions been decided? How is the present case related to the former litigation?

In the opinion of the Court, what was the effect of the war upon the partnership? Did this mean that Mayer lost all claim to any share in the assets of the German business? Explain the status of Mayer's rights in the German business while the war lasted. Did any change occur in the status of these rights at the termination of the war?

What had the German partners done with respect to Mayer's share in the German business? What did Mayer contend they had done? What difference did this make to Mayer? What did the Court think of this contention of Mayer's? Do you think the Court took the correct position on this point?

What role was played in the case by the depreciation of the German mark? What was Mayer's contention in this respect and how was it related to his other contentions? How did the Court dispose of this argument? Do you think the Court took the correct attitude?

10. Mr. Smith is an inhabitant of State A, though a national of State C, and Mr. Jones is an inhabitant and a national of State B. States A and B are at war, other States being neutral. State the law in the following situations:

(a) Smith contracts to deliver cotton to Jones, to be paid for in installments. The cotton has been delivered but only one installment has been paid when the war breaks out. Can subsequent installments be paid?

(b) Smith contracts to deliver cotton to Jones, who pays in advance. The outbreak of war prevents delivery of the cotton. What redress has Jones?

(c) Smith insures the life of Jones in consideration of payment of premiums annually. Two premiums fall due during the war and are not paid, and subsequently, still during the war, Jones dies. After the war the heirs of Jones offer the two premiums and ask that the amount of the policy be paid.

(d) Would the situation in (c) have been altered if, subsequent to the outbreak of war, Smith had appointed Johnson, national of and resident in State B, as his agent with respect to policies written on inhabitants of State B?

XVI

Conduct of Hostilities on Land and in the Air

§ 153. THE VALUE OF RULES GOVERNING THE CONDUCT OF HOSTILITIES

NOTE BY THE EDITOR

It is impossible in a book of this scope to indicate in any detail the practice as to the various treaty rules governing the conduct of land warfare, in the World War, the Italo-Ethiopian conflict, the Sino-Japanese hostilities, the Civil War in Spain, or the European War of 1939. This is the more to be regretted because, in the public mind, it is believed that these rules were so generally violated that they became practically useless, and this belief in turn creates popular distrust of all international law.

There is no doubt, of course, that many provisions of these rules were violated, and it is for this reason that the editor has deemed it advisable to call attention, in footnotes to various articles, to the accounts of practice in 1914-1918 in Professor Garner's *International Law and the World War* (2 vols., 1920) and other sources. The editor, however, wishes at this point to suggest some considerations which seem to him to be of great importance for any final evaluation of the written rules of land warfare:

1. Most of the Conventions embodying these rules *have not been denounced since the wars of 1914-1918*, and additional States have adhered to some of them since these wars. They are thus *still the law* between contracting States, which must still consider them to have some value.

2. Many provisions of the conventional rules stood the test of the wars of 1914-1918; that is, while isolated violations may have occurred, as is usually the case with rules of law, these provisions were not alleged by belligerents to have been generally violated. It is believed that this statement is true, for

instance, of Chapter I of the Hague *Regulations* (page 756 below), dealing with the qualifications of belligerents; of a number of the prohibitions of means of injuring the enemy mentioned in Article 23 of the same *Regulations*; and of the Declaration (IV, 3) of 1899 (page 768 below), dealing with expanding bullets.

3. Many of the provisions which belligerents claimed were "violated," in order to use the "violations" as propaganda against the enemy, were in reality vague and ambiguous. An examination of the Proceedings of the Hague Peace Conferences reveals that many of the provisions were drawn up by military men following sharp differences of opinion, and were so drafted as to permit conflicting interpretations. To take an important example of ambiguity—one from among many—Article 25 of the *Regulations* provides that the "attack or bombardment by whatever means, of towns, villages, habitations or buildings *which are not defended*, is prohibited." When is a town, for instance, defended? When soldiers are present? When guns can be seen? When munitions are stored there? When it is a junction for troop movements? Under the wording of this Article, bombardments claimed by one belligerent to violate the rule could be claimed by the adversary to have been carried out within the spirit of the rule.

This point of ambiguity is not made with the idea of condoning the commission of acts which seemed to the lay mind clear violations of the rules. It is rather with the object of suggesting that much of the public indignation directed at "violators" of the rules should have been directed at the drafters of rules which in themselves were practically meaningless. Many States share in the responsibility for such ambiguities.

4. Many violations of the rules were excused by each belligerent, particularly in the later stages of the hostilities, on the ground of reprisals. In the end belligerents justified large breaches of one branch of international law on grounds of large breaches of another branch of the law on the part of the enemy. Previous doctrines of war reprisals¹ had taught that reprisal was an act of retaliation upon the enemy, proportioned in severity to the offense of the enemy, done when the enemy had violated the law, and designed to induce him to observe the law. Thus, when Bismarck was refused the release of the crews of captured German merchantmen during the Franco-Prussian War, he had forty Frenchmen of importance arrested and sent to Bremen for the duration of the war. But this idea of specific punishments for specific offenses, designed to bring the enemy back to the observance of the law, was obscured in 1914-1918 by the development of doctrines of reprisal which inundated as in a flood many of the most important specific rules of the law which had been developed in the previous cen-

¹ Not to be confused with reprisals in the absence of legal war, treated in §§ 124, 126, 127.—Ed.

tury. This was especially true in maritime warfare. (See §§ 168, 169 below.) Under these circumstances it became all too plausible to say that during war the doctrine of reprisals had swallowed up the rest of international law.

5. Many of the so-called "violations" were not treated in the written rules at all. This was true of the taking of hostages, for example.² While such "violations" may have been contrary to the customary law, they afford no ground for criticism of the written rules.

Even with these considerations in mind, however, one cannot be optimistic as to the prospect that all of these rules will be generally and scrupulously observed, especially where relatively new weapons are involved. Recent experience forbids optimism with respect to the use of gas and aircraft. Nevertheless, the rules do represent standards of conduct which it is probably better to have than to do without. One cannot guess what war would be like if there were no such rules, though one knows what will happen when an army becomes a mob, as the Japanese Army became at Nanking. Even at their worst, modern armies do not seem to have approached the savagery of the Thirty Years' War; and the gap between the modern rules and the modern practice is hardly comparable with the gap between Grotius' *De Jure Belli ac Pacis* and the exterminations of the Thirty Years' War.

One cannot leave this subject without referring to recent philosophies of totalitarian war, which constitute probably the gravest threat to the continuance of any rules that endeavor to protect noncombatant persons and noncontraband property. If it is to be true that war is an enterprise of the whole State, in which the State more and more enlists and formally organizes the services of all its citizens and all its property, in the use of every method to obtain a quick victory—and if there are no other factors to be considered—of course there is less and less logic in the effort to protect noncombatants and noncontraband. It may very well be that this is the course of history, especially if the organization of States is to be totalitarian in peace as it has generally tended to be in war. The rules protecting noncombatants and noncontraband treated herein grew up in an era of insistence on the rights of men and of property even as against the State; they reflect in international law a principle of the first importance in the constitutional law and legislation of all free States. Is it reasonable to suppose, however, that a State which commands all the liberties and all the properties of its own citizens in time of peace will in the long run respect the liberties and properties of enemy citizens in war on a theory that they are "noncombatant"? And is it reasonable to suppose that nontotalitarian States, if in conflict with such adversaries, can long afford scrupulously to respect these principles of protection? Even for nontotalitarian States, war is the most totalitarian of enterprises. May it not be that the survival of respect for persons and property

² See Garner, *op. cit.*, Vol. I, Secs. 195-201.

in war is inevitably contingent upon the survival of respect for the rights of persons and property in peace?³

§ 154. LAWS AND CUSTOMS OF WAR ON LAND

The Hague Convention (IV) of 1907 is printed in preference to the Hague Convention (II) of 1899 because its statement of rules is later and more complete. It appears, moreover, that the various allegations of violations of the rules made in the years 1914-1918 could be supported about equally well on the basis of either Convention. Attention is called to the statement in the preamble (present also in the Convention of 1899) that, in cases not covered by the texts, the principles of the law of nations, and not the arbitrary judgment of the military commanders, should be observed.

Hague Convention (IV) Respecting the Laws and Customs of War on Land¹

SIGNED AT THE HAGUE, OCTOBER 18, 1907

English text from J. B. Scott, *Hague Conventions and Declarations of 1899 and 1907*, pp. 100-129.²

[Names of States are omitted.]

Seeing that, while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case

³ For a portentous raising of the question of the sanctity of private property in war, see Sir John Fischer Williams, "War and Private Property" in his *Chapters on Current International Law and the League of Nations* (1929), p. 188; and on both property and persons, the pages of Garner. For the best modern defense of the essential principles represented in present rules, see J. B. Moore, *International Law and Some Current Illusions* (1924), pp. 1-39.

¹ States which have ratified or adhered to this Convention are as follows: Austria (deposited ratification October 25, 1937), Austria-Hungary (with reservation), Belgium, Bolivia, Brazil, China (adhered May 10, 1917), Cuba, Denmark, El Salvador, Ethiopia (adhered August 5, 1935), Finland (adhered June 9, 1922), France, Germany (with reservation), Great Britain, Guatemala, Haiti, Japan (with reservation), Liberia (adhered February 4, 1914), Luxemburg, Mexico, Netherlands, Nicaragua, Norway, Panama, Poland (adhered May 9, 1925), Portugal, Roumania, Russia (with reservation), Siam, Sweden, Switzerland, and the United States of America. (As of August, 1939.)

Under the terms of its Article 4, this Convention was to be "substituted for the Convention of the 29th July, 1899, respecting the laws and customs of war on land. The Convention of 1899 remains in force as between the Powers which signed it, and which do not also ratify the present Convention." The States which ratified or adhered to the Convention of 1899, but did not ratify or adhere to the Convention of 1907, are as follows: Argentine, Bulgaria, Chile, Colombia, Dominican Republic, Ecuador, Greece, Honduras, Italy, Korea, Montenegro, Paraguay, Peru, Persia, Serbia, Spain, Turkey, Uruguay, and Venezuela. States which ratified or adhered to the Convention of 1907 but not to that of 1899 are Ethiopia, Finland, Liberia, and Poland.

In the World War of 1914, all the belligerents appear to have ratified or adhered to one or the other of the Conventions, with the exception of San Marino, whose war with Austria-Hungary began June 3, 1915. Technically, both Conventions ceased to be binding on that date at the discretion of any belligerent, under the terms of their respective second articles. However, in the preamble of the Convention of 1907, the Parties declared that, "in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."—Ed.

² The italics in Professor Scott's reprint, indicating differences from the 1899 Convention, are restored to Roman type.—Ed.

where the appeal to arms has been brought about by events which their care was unable to avert;

Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization;

Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible;

Have deemed it necessary to complete and explain in certain particulars the work of the First Peace Conference, which, following on the Brussels Conference of 1874, and inspired by the ideas dictated by a wise and generous forethought, adopted provisions intended to define and govern the usages of war on land.

According to the views of the high contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.

It has not, however, been found possible at present to concert regulations covering all the circumstances which arise in practice;

On the other hand, the high contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.

Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

They declare that it is in this sense especially that Articles 1 and 2 of the Regulations adopted must be understood.

The high contracting Parties, wishing to conclude a fresh Convention to this effect, have appointed the following as their plenipotentiaries:

[Here follow the names of plenipotentiaries.]

Who, after having deposited their full powers, found in good and due form, have agreed upon the following:

ARTICLE 1. The contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention.

ARTICLE 2. The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between

contracting Powers, and then only if all the belligerents are parties to the Convention.

ARTICLE 3. A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

ARTICLE 4. The present Convention, duly ratified, shall as between the contracting Powers, be substituted for the Convention of the 29th July, 1899, respecting the laws and customs of war on land.

The Convention of 1899 remains in force as between the Powers which signed it, and which do not also ratify the present Convention.

[Articles 5-9, and signatures, are omitted.]

Annex to the Convention

REGULATIONS RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND

SECTION I. ON BELLIGERENTS

CHAPTER I. *The Qualifications of Belligerents*

ARTICLE 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."³

ARTICLE 2. The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.⁴

³ "Prior to the recent great conflict . . . the development of the laws of war, running through a number of centuries, had been in the direction of establishing and extending the following general principles: 1. The observance of the distinction between combatants and non-combatants and the protection of non-combatants against injuries not incidental to military operations against combatants. . . ."—J. B. Moore, *International Law and Some Current Illusions* (1924), pp. 4-5.

"Since International Law is a law between States only and exclusively, no rules of International Law can exist to prohibit private individuals from taking up arms, and committing hostilities against the enemy. But private individuals committing such acts do not enjoy the privileges of members of armed forces, and the enemy has, according to a customary rule of International Law, the right to consider, and punish, such individuals as war criminals."—Lauterpacht's *Oppenheim*, I, 456.—Ed.

⁴ This is what is called a *levy en masse*. Note that the rule applies only in unoccupied territory. "Totally different . . . is a *levy en masse* of the population of a territory already

ARTICLE 3. The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.

CHAPTER II. *Prisoners of War*⁵

ARTICLE 4. Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them.

They must be humanely treated.

invaded by the enemy. . . . Article 2 of the Hague Regulations does not cover this case, in which the old customary rule of International Law is valid, that those taking part in such a levy *en masse* are liable to be shot if captured."—Lauterpacht's *Oppenheim*, II, 211.—ED.

⁵ For treatment of prisoners 1914-1918, see Garner, *International Law and the World War*, Vol. I, Chaps. XXI, XXII; Oppenheim, *International Law*, 5th Ed. (Lauterpacht, 1935), II, 301-314.

A new *Convention Relating to the Treatment of Prisoners of War* was signed at Geneva July 27, 1929, and came into force June 19, 1931. Ratifying or adhering States are: Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Canada, Chile, China, Denmark, Egypt, Estonia, France, Germany, Great Britain, Greece, Hungary, India, Iraq, Italy, Latvia, Lithuania, Mexico, New Zealand, Norway, Poland, Portugal, Roumania, Siam, Spain, Sweden, Switzerland, Turkey, Union of South Africa, United States of America, and Yugoslavia (as of August, 1939).

According to its Article 89, "In the relations between Powers bound by the Hague Convention respecting the Law and Customs of War on Land, whether it is a question of that of July 29, 1899, or that of October 18, 1907, printed above and who participate in the present Convention, this latter shall complete Chapter II of the Regulations annexed to the said Hague Conventions."

Its length (it contains ninety-five articles) precludes its being printed in this book. It may be summarized as an attempt to give the benefit of advanced principles of civil penology to prisoners of war.

Prisoners are to be evacuated "to depots located in a region far enough from the zone of combat for them to be out of danger" (Art. 7). Prisoners captured in unhealthy regions shall be transported to a more favorable climate (Art. 9). They must be lodged in healthful quarters, protected from dampness, and with sufficient heat and light (Art. 10). Food rations are to be equal "to that of troops at base camps of the detaining Power," and prisoners are to have facilities for preparing additional food. "A sufficiency of potable water shall be furnished them. The use of tobacco shall be permitted. . . . All collective disciplinary measures affecting the food are prohibited" (Art. 11). Clothing is to be furnished by the detaining Power. "Canteens shall be installed . . . where prisoners may obtain, at the local market price, food products and ordinary objects. Profits made . . . shall be used for the benefit of prisoners" (Art. 12). Prisoners are to have "day and night, installations conforming to sanitary rules and constantly maintained in a state of cleanliness. . . . It shall be possible for them to take physical exercise and enjoy the open air" (Art. 13). Prisoners must have access to an infirmary, and if seriously ill or in need of an important surgical operation "must be admitted, at the expense of the detaining Power, to any military or civil medical unit qualified to treat them" (Art. 14). Prisoners are to have freedom of religion, and intellectual diversions and sports are to be encouraged (Arts. 16, 17). Officers are to receive pay once a month if possible, on the same basis as officers of the same rank in the army of the detaining power (Art. 23). Facilities are to be granted for the transfer of pay "to banks or private persons in their country of origin" (Art. 24).

The labor of prisoners may be utilized (officers excepted). "Belligerents shall be bound during the whole period of captivity, to allow to prisoners of war who are victims of accidents in connection with their work the enjoyment of the benefit of the provisions applicable to laborers of the same class according to the legislation of the detaining Power. . . ." (Art. 27). "The length of the day's work . . . must not . . . exceed that allowed for the civil workers in the region employed at the same work. Every prisoner shall be allowed a rest of twenty-four consecutive hours every week, preferably on Sunday" (Art. 30). Labor related to the war operations, and especially in the manufacture or transportation of munitions or transporting material for combatant units, is prohibited; and in case of violation, prisoners

All their personal belongings, except arms, horses, and military papers, remain their property.

ARTICLE 5. Prisoners of war may be interned in a town, fortress, camp, or other place, and bound not to go beyond certain fixed limits; but they can

may protest through agents provided in Articles 43 and 44 (Art. 31). "It is forbidden to use prisoners . . . at unhealthful or dangerous work. Any aggravation of the conditions of labor by disciplinary measures is forbidden" (Art. 32). Prisoners of war are not to receive wages for work connected with the camps, but on other work, failing an agreement between the belligerents, are to be paid: (a) if the work is for the State, at the rate "in force for soldiers of the national army doing the same work . . ." (b) if done for the account of other public administrations or for private persons, "conditions shall be regulated by agreement with the military authority." The pay remaining "shall be delivered to him [the prisoner] at the end of his captivity."

A given number of postcards is to be established, which each prisoner is to be permitted to send. These "may not be delayed or retained for disciplinary reasons" (Art. 36). Prisoners shall be allowed "individually to receive parcels by mail, containing foods and other articles intended to supply them with food or clothing" (Art. 37). "Prisoners may, in cases of acknowledged urgency, be allowed to send telegrams, paying the usual charges" (Art. 38). They may receive books, subject to censorship (Art. 39). "Censorship of correspondence must be effected within the shortest possible time. Furthermore, inspection of parcels post must be effected under proper conditions more to guarantee the preservation of the products which they may contain, and if possible, in the presence of the addressee or an agent duly recognized by him. . . . Prohibitions of correspondence promulgated by the belligerents for military or political reasons, must be transient in character and as short as possible" (Art. 40).

Prisoners have a right to inform the military authorities of their requests with regard to the conditions of their captivity, and to complain to the representatives of "protecting powers" as to these conditions. "Even if they are recognized to be unfounded, they may not occasion any punishment" (Art. 42). Prisoners may appoint agents to represent them, with the approval of the military authorities, which agents shall distribute collective shipments and organize "mutual assistance" systems (Art. 43). When employed as laborers, time spent as agents "must be counted in the compulsory period of labor." Intercourse with the military authorities and with the protecting Power "shall not be limited. No representative of the prisoners may be transferred without the necessary time being allowed him to inform his successors about affairs under consideration" (Art. 44).

Prisoners "shall be subject to the laws, regulations, and orders in force in the armies of the detaining Power" (Art. 45). Other punishments than those provided in such laws for soldiers in the national armies may not be inflicted by the military authorities and courts. "Corporal punishment," "imprisonment in quarters without daylight," "any form of cruelty," and "collective punishment for individual acts," are forbidden (Art. 46). Attempted escapes are to "be verified immediately"; "preventive arrest shall be reduced to the absolute minimum" (Art. 47). Escaped prisoners who are retaken "shall be liable only to disciplinary punishment," if retaken before they succeed in rejoining their own army or quitting the territory; if afterward, they "shall not be liable to any punishment on account of their previous flight" (Art. 50). The competent authorities are to exercise "the greatest leniency in deciding . . . whether an infraction . . . should be punished by disciplinary or judicial measures," especially in cases of escape or attempted escape (Art. 52). Eligibility for repatriation is not to be affected by the fact that a prisoner has not undergone an imposed disciplinary punishment; but a prisoner threatened with a penal prosecution may be excluded from repatriation until conclusion of the proceedings and the punishment (Art. 53).

Arrest for a period of thirty days is the most severe single disciplinary punishment; this maximum may not be exceeded in cases of several connected offenses; and if a new disciplinary punishment is imposed, at least three days shall separate periods of arrest lasting ten days or more (Art. 54). Prisoners undergoing disciplinary punishment are to suffer only the food restrictions allowed in the armies of the detaining Power, and then only if their health permits (Art. 55); they may not be removed to penitentiaries; they are to be allowed sanitary quarters and to stay in the open air two hours daily (Art. 56); they must be allowed to read and write, and to send and receive letters (Art. 57); they are to receive necessary medical attention (Art. 58); the punishment must be imposed by a camp commander or other responsible officer (Art. 59).

Judicial proceedings against a prisoner must be notified at their opening to a repre-

not be confined except as an indispensable measure of safety and only while the circumstances which necessitate the measure continue to exist.

ARTICLE 6. The State may utilize the labor of prisoners of war according to their rank and aptitude, officers excepted. The tasks shall not be excessive and shall have no connection with the operations of the war.

Prisoners may be authorized to work for the public service, for private persons, or on their own account.

Work done for the State is paid for at the rates in force for work of a similar kind done by soldiers of the national army, or, if there are none in force, at a rate according to the work executed.

When the work is for other branches of the public service or for private persons the conditions are settled in agreement with the military authorities.

The wages of the prisoners shall go towards improving their position, and the balance shall be paid them on their release, after deducting the cost of their maintenance.

ARTICLE 7. The Government into whose hands prisoners of war have fallen is charged with their maintenance.

In the absence of a special agreement between the belligerents, prisoners of war shall be treated as regards board, lodging, and clothing on the same footing as the troops of the Government who captured them.

sentative of the "protecting Power," and this must always be before the opening of the trial (Art. 60). "No prisoner may be sentenced without having had an opportunity to defend himself. No prisoner may be obliged to admit himself guilty . . ." (Art. 61). He is entitled "to assistance by a qualified counsel of his choice" and a competent interpreter. He must be advised of these rights; and in default of a choice of counsel by the prisoner, "the protecting Power may obtain a counsel for him. . . . Representatives of the protecting Power shall be entitled to attend the trial of the case," except where the detaining Power notified the protecting Power that the trial must be secret "in the interest of the safety of the State" (Art. 62). The prisoner is to be entitled to the same courts and procedure (Art. 63) and the same right of appeal (Art. 64) as persons belonging to the armed forces of the detaining Power. Sentences must be communicated immediately to the protecting Power (Art. 65); death sentences shall not be executed until three months after they have been communicated to the protecting Power "for transmission to the Power in whose armies the prisoner served" (Art. 66).

Title IV, Termination of Captivity, contains elaborate provisions for: (Section I) Direct Repatriation and Hospitalization in a Neutral Country; (Section II) Release and Repatriation Upon Cessation of Hostilities. Title V contains provisions relating to the Death of Prisoners of War. Title VI contains provisions for Bureaus of Relief and Information Concerning Prisoners of War. Title VII provides for the Application of the Convention to Certain Classes of Civilians. Title VIII provides for the Execution of the Convention, a part of Art. 83 containing the provision that "In case, in time of war, one of the belligerents is not a party to the Convention, its provisions shall nevertheless remain in force as between the belligerents who are parties thereto." Article 95 provides that "A state of war shall give immediate effect to ratifications deposited and to adherences notified by belligerent Powers prior to or after the outbreak of hostilities." Article 96, while providing for denunciation on one year's notice, states that "such denunciation shall not take effect during a war in which the denouncing Power is involved. In this case, the present Convention shall continue in effect, beyond the period of one year, until the conclusion of peace, and, in any event, until the processes of repatriation are completed."

Texts of the Convention may be found in *U.S.T.S.*, No. 846; *League of Nations Treaty Series*, No. 2734; 27 *A.J.I.L.* (Supp., April, 1933), 59.—Ed.

ARTICLE 8. Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary.

Escaped prisoners who are retaken before being able to rejoin their own army or before leaving the territory occupied by the army which captured them are liable to disciplinary punishment.

Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of the previous flight.

ARTICLE 9. Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, and if he infringes this rule, he is liable to have the advantages given to prisoners of his class curtailed.

ARTICLE 10. Prisoners of war may be set at liberty on parole if the laws of their country allow, and, in such cases, they are bound, on their personal honor, scrupulously to fulfil, both towards their own Government and the Government by whom they were made prisoners, the engagements they have contracted.

In such cases their own Government is bound neither to require of nor accept from them any service incompatible with the parole given.

ARTICLE 11. A prisoner of war can not be compelled to accept his liberty on parole; similarly the hostile Government is not obliged to accede to the request of the prisoner to be set at liberty on parole.

ARTICLE 12. Prisoners of war liberated on parole and recaptured bearing arms against the Government to whom they had pledged their honor, or against the allies of that Government, forfeit their right to be treated as prisoners of war, and can be brought before the courts.

ARTICLE 13. Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they are accompanying.

ARTICLE 14. An inquiry office for prisoners of war is instituted on the commencement of hostilities in each of the belligerent States, and, when necessary, in neutral countries which have received belligerents in their territory. It is the function of this office to reply to all inquiries about the prisoners. It receives from the various services concerned full information respecting internments and transfers, releases on parole, exchanges, escapes, admissions into hospital, deaths, as well as other information necessary to enable it to make out and keep up to date an individual return for each prisoner of war. The office must state in this return the regimental number, name and surname, age, place of origin, rank, unit, wounds, date and place

of capture, internment, wounding, and death, as well as any observations of a special character. The individual return shall be sent to the Government of the other belligerent after the conclusion of peace.

It is likewise the function of the inquiry office to receive and collect all objects of personal use, valuables, letters, etc., found on the field of battle or left by prisoners who have been released on parole, or exchanged, or who have escaped, or died in hospitals or ambulances, and to forward them to those concerned.

ARTICLE 15. Relief societies for prisoners of war, which are properly constituted in accordance with the laws of their country and with the object of serving as the channel for charitable effort shall receive from the belligerents, for themselves and their duly accredited agents every facility for the efficient performance of their humane task within the bounds imposed by military necessities and administrative regulations. Agents of these societies may be admitted to the places of internment for the purpose of distributing relief, as also to the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an undertaking in writing to comply with all measures of order and police which the latter may issue.

ARTICLE 16. Inquiry offices enjoy the privilege of free postage. Letters, money orders, and valuables, as well as parcels by post, intended for prisoners of war, or dispatched by them, shall be exempt from all postal duties in the countries of origin and destination, as well as in the countries they pass through.

Presents and relief in kind for prisoners of war shall be admitted free of all import or other duties, as well as of payments for carriage by the State railways.

ARTICLE 17. Officers taken prisoners shall receive the same rate of pay as officers of corresponding rank in the country where they are detained, the amount to be ultimately refunded by their own Government.

ARTICLE 18. Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of whatever church they may belong to, on the sole condition that they comply with the measures of order and police issued by the military authorities.

ARTICLE 19. The wills of prisoners of war are received or drawn up in the same way as for soldiers of the national army.

The same rules shall be observed regarding death certificates as well as for the burial of prisoners of war, due regard being paid to their grade and rank.

ARTICLE 20. After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.

CHAPTER III. *The Sick and Wounded*

ARTICLE 21. The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention.

SECTION II. HOSTILITIES

CHAPTER I. *Means of Injuring the Enemy, Sieges, and Bombardments*

ARTICLE 22. The right of belligerents to adopt means of injuring the enemy is not unlimited.

ARTICLE 23.⁶ In addition to the prohibitions provided by special Conventions, it is especially forbidden—

- (a.) To employ poison or poisoned weapons;⁷
- (b.) To kill or wound treacherously individuals belonging to the hostile nation or army;⁸
- (c.) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;
- (d.) To declare that no quarter will be given;⁹

⁶ The violations of Section II of the Regulations occurring on the Western Front, 1914-1918, which were widely publicized and used for propaganda purposes, brought the whole of these Regulations into disrepute, although other provisions were observed as well as could be expected in a war fought under immobile conditions and on a huge scale. Attention should be drawn to the fact that there were parts of Article 23 even which were not alleged to have been generally violated: this might be said of (b.), (c.), (d.), (f.), and (h.).

For a description of the use of "Forbidden Weapons and Instrumentalities," see Garner, *International Law and the World War*, Vol. I, Chaps. X, XI; Oppenheim, *International Law*, 5th Ed. (Lauterpacht, 1935), II, 279-290; Pitt Cobbett, *Cases in International Law*, 5th Ed. (Walker, 1937), II, 138-144. As to "Asphyxiating Gases," see § 156 below.—Ed.

⁷ In the Southwest Africa campaign in 1915 the German forces poisoned the wells with arsenical cattle dip on evacuating Swakopmund, but claimed to have posted notices in all such cases. The measure was defended under these circumstances as a mere deprivation of the water supply, allowable under the customary law, and it was contended that Article 23 (a.) prohibited only *secret* poisoning. Garner, I, 288-292.

Is the use of gas prohibited as poison? The question is debatable, though W. L. Walker thinks it is. The Convention "was intended to cover not merely poisoned arms but food poisoning, water poisoning, and all use of poison; . . . poison fumes discharged through the air are as much poison as arsenic placed in a well. And apart from the Convention, the use of poison was prohibited by the customary law."—Walker's Pitt Cobbett, II, 140.—Ed.

⁸ "Accordingly: no assassin must be hired, and no assassination of combatants be committed; a price may not be put on the head of an enemy individual; proscription and outlawing are prohibited; no treacherous request for quarter must be made; no treacherous simulation of sickness or wounds is permitted."—II Lauterpacht's Oppenheim, 283. Treachery ordinarily involves the idea of perfidy or breach of faith, as in the case of misuse of the flag of truce or the Red Cross flag.—Ed.

⁹ "60. It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give, and therefore will not expect, quarter; but a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it *impossible* to encumber himself with prisoners. 61. Troops that give no quarter have no right to kill enemies already disabled on the ground, or prisoners captured by other troops. 62. All troops of the enemy known or discovered to give no quarter in general, or to any portion of the army, receive none. 63. Troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter. . . . 66. Quarter having been given to an

(e.) To employ arms, projectiles, or material calculated to cause unnecessary suffering;¹⁰

(f.) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;

(g.) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;¹¹

(h.) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.¹²

A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.¹³

ARTICLE 24. Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.¹⁴

enemy by American troops, under a misapprehension of his true character, he may, nevertheless, be ordered to suffer death if, within three days after the battle, it be discovered that he belongs to a corps which gives no quarter."—*Instructions for the Government of Armies of the United States in the Field*, 1863 ("Lieber's Code;" "General Orders No. 100").—Ed.

¹⁰ This is a restatement of a customary rule. It will probably never be given a generally accepted interpretation as applied to such weapons as gases, liquid fire, and bacteriological warfare; hence the attempts to prohibit specific weapons and methods by specific conventional agreements. (See §§ 155-157 below.) The phrase is "*calculated* to cause unnecessary suffering." It may thus have no application to unanticipated suffering when the weapon is normally used. Moreover, it will always be argued by military men that suffering which has the effect of putting combatants out of action cannot be considered unnecessary. It seems better to regard this rule as a general principle of humanity, whose application is chiefly possible through the acceptance of more specific rules.—Ed.

¹¹ Cf. Articles 46, 47, 53-56.—Ed.

¹² Cf. *Porter v. Freudenberg*, § 144.—Ed.

¹³ An application of this rule occurs in the case where a belligerent force seeks to employ the services of the national of occupied territory as a guide. Lieber's Code permitted the impressment of such guides, while declaring it treason for such guides to serve voluntarily. If impressed, they were required not to mislead their captors on pain of death. (Articles 93-97.) It was sometimes supposed that the above Article and Article 44 of the Regulations had changed this rule, but authorities differ. The Germans employed such guides during the World War. (See Garner, I, 135-139.) To the editor the rule of Lieber's Code is more realistic and sufficiently safeguards the person compelled to act as guide.

The line between work permitted and that not permitted under this rule is sometimes very difficult to draw. Thus Germany required nationals of occupied areas to work on roads, repair destroyed bridges, build trenches and military works, manufacture barbed wire, and in the case of Belgian Railway employees, to keep the railways in operation, a matter of great importance to the German military operations. Garner doubts the permissibility of these practices, with the possible exception of work on roads and bridges. (II, 138.) If war comes to be regarded as a totalitarian enterprise, this rule and that of Article 44 will hardly survive.—Ed.

¹⁴ "Ruses of war, or stratagems, are deceit employed in the interest of military operations for the purpose of misleading the enemy." Listed as permissible: ambushes, feigned attacks or withdrawals, "planted" false information. More doubtful are the bribery of enemy commanders and the secret securing of desertion by enemy soldiers. But perfidy is not permitted. "Halleck correctly formulates the distinction by laying down the principle that, whenever a belligerent has expressly or tacitly engaged, and is therefore bound by a moral obligation,

ARTICLE 25. The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.¹⁵

ARTICLE 26. The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.

ARTICLE 27. In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.¹⁶

ARTICLE 28. The pillage of a town or place, even when taken by assault, is prohibited.

CHAPTER II. *Spies*

ARTICLE 29. A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, intrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.

ARTICLE 30. A spy taken in the act shall not be punished without previous trial.

ARTICLE 31. A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.

to speak the truth to an enemy, it is perfidy to betray his confidence, because it constitutes a breach of good faith."—Lauterpacht's *Oppenheim*, II, 340-342.—Ed.

¹⁵ See §§ 157, 159, 160 below. "By whatever means" is contended to include the use of gas and aircraft, but the question of when a town, dwelling, or building is "undefended" is well-nigh insoluble under modern conditions. Were Ethiopian towns defended against air attack because Ethiopians could fire at aircraft with antiquated rifles? Is London undefended, with its barracks, arsenals, warehouses, munitions plants, and railway centers for the distribution of troops and war materials? It is almost always possible for the attacker to make out some kind of a case that the place attacked is defended. See Garner, Vol. I, Chaps. XVII, XIX; Lauterpacht's *Oppenheim*, II, 333-336, 412-420 (air); Walker's *Pitt Cobbett*, II, 127-130, 144-150.—Ed.

¹⁶ See Garner, Vol. I, Chap. XVIII.—Ed.

CHAPTER III. *Flags of Truce*

ARTICLE 32. A person is regarded as a *parlementaire* who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag. He has a right to inviolability, as well as the trumpeter, bugler or drummer, the flag-bearer and interpreter who may accompany him.

ARTICLE 33. The commander to whom a *parlementaire* is sent is not in all cases obliged to receive him.

He may take all the necessary steps to prevent the *parlementaire* taking advantage of his mission to obtain information.

In case of abuse, he has the right to detain the *parlementaire* temporarily.

ARTICLE 34. The *parlementaire* loses his rights of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treason.

CHAPTER IV. *Capitulations*

ARTICLE 35. Capitulations agreed upon between the contracting Parties must take into account the rules of military honor.

Once settled, they must be scrupulously observed by both parties.

CHAPTER V. *Armistices*

ARTICLE 36. An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

ARTICLE 37. An armistice may be general or local. The first suspends the military operations of the belligerent States everywhere; the second only between certain fractions of the belligerent armies and within a fixed radius.

ARTICLE 38. An armistice must be notified officially and in good time to the competent authorities and to the troops. Hostilities are suspended immediately after the notification, or on the date fixed.

ARTICLE 39. It rests with the contracting Parties to settle, in the terms of the armistice, what communications may be held in the theatre of war with the inhabitants and between the inhabitants of one belligerent State and those of the other.

ARTICLE 40. Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.

ARTICLE 41. A violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand the

punishment of the offenders or, if necessary, compensation for the losses sustained.

SECTION III. MILITARY AUTHORITY OVER THE TERRITORY OF THE HOSTILE STATE¹⁷

ARTICLE 42. Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.

ARTICLE 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

ARTICLE 44. A belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense.¹⁸

ARTICLE 45. It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.

ARTICLE 46. Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

Private property can not be confiscated.¹⁹

ARTICLE 47. Pillage is formally forbidden.²⁰

ARTICLE 48. If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.²¹

ARTICLE 49. If, in addition to the taxes mentioned in the above article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question.

¹⁷ See Garner, Vol. II, Chaps. XXIII-XXVI; Lauterpacht's *Oppenheim*, II, 343-357; Walker's *Pitt Cobbett*, II, 165-174.—Ed.

¹⁸ See Article 23 above.—Ed.

¹⁹ Nevertheless, both public and private buildings may be converted into barracks or hospitals or used for other necessary military purposes without compensation to the owners; and under Article 56, war materials may be seized, subject to restoration and fixing of compensation in the treaty of peace. (Lauterpacht's *Oppenheim*, II, 319-320.)—Ed.

²⁰ See notes to Articles 52 and 53.—Ed.

²¹ See Garner, Vol. II, Chap. XXV, and Lauterpacht's *Oppenheim*, II, 322-328. The German authorities exacted large contributions from occupied communities in France and Belgium, but it is not clear that these went beyond the purposes allowed in Article 49.—Ed.

ARTICLE 50. No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they can not be regarded as jointly and severally responsible.²²

ARTICLE 51. No contribution shall be collected except under a written order, and on the responsibility of a commander-in-chief.

The collection of the said contribution shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force.²³

For every contribution a receipt shall be given to the contributors.

ARTICLE 52. Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.²³

ARTICLE 53. An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.²⁴

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law; depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

ARTICLE 54. Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute

²² See Garner, Vol. II, Chap. XXVI, for many cases in which German military authorities imposed both pecuniary and other penalties on communities occupied in France and Belgium, for acts committed by inhabitants against the military authorities. Prior to the Hague Convention, such measures seem to have been accepted: the British used them in the South African War. None the less, they are clearly forbidden by Article 50.—Ed.

²³ See Garner, II, 122 ff., for an account of German requisitions of horses, cattle, machinery, and railway materials, which were sent into Germany. Garner contends that these requisitions were not for the needs of the army of occupation and hence violated Articles 52 and 53; and see Lauterpacht's Oppenheim, II, 325, 326, for citations of jurisprudence on requisitions. Reparation was required in the Treaty of Versailles, Articles 238 and 244, Annexes.—Ed.

²⁴ See Garner, II, 129 ff., for an account of German confiscations of deposits in Belgian and French banks, and in Belgian postoffices; and Cybichowski, in 26 *Zeitschrift für internationales Recht*, at 407, for an account of similar Russian confiscations while occupying Lemberg.—Ed.

necessity. They must likewise be restored and compensation fixed when peace is made.

ARTICLE 55. The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.²⁵

ARTICLE 56. The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

§ 155. FORBIDDEN WEAPONS: EXPANDING BULLETS

Declaration (IV, 3) Concerning Expanding Bullets¹

SIGNED AT THE HAGUE, JULY 29, 1899

English text from J. B. Scott, *Hague Conventions and Declarations of 1899 and 1907* (1915), p. 227.

[Preamble omitted.]

The undersigned declare as follows:

²⁵ This rule denies that the occupying State may appropriate immovable State property by virtue merely of occupation. Treaties of peace ordinarily deal with such questions. Consequently an occupying State may not legally alienate such property. But it may sell current crops from public land, lease buildings for a period terminable by the end of the occupation, and cut timber in public forests. The general principle is that the capital is to be conserved. (Lauterpacht's *Oppenheim*, II, 315-316.) For an account of German cutting of French and Belgian forests contrary to this rule, see Garner, II, 128-129, and *In re Falck*, a decision of the French Court of Cassation, in *Annual Digest*, 1927-28, Case No. 383.

Note that these principles do not apply to property of local governments, which are assimilated to private property in Article 56.—Ed.

¹ This Declaration has been ratified or adhered to by the following States: Austria (deposited ratification October 25, 1937), Austria-Hungary, Belgium, Bulgaria, China, Denmark, Ethiopia (adhered August 9, 1935), France, Germany, Great Britain, Greece, Italy, Japan, Luxemburg, Mexico, Montenegro, Netherlands, Nicaragua, Norway, Persia, Portugal, Roumania, Russia, Servia, Siam, Spain, Sweden, Switzerland, and Turkey. (As of August, 1939.) The United States of America did not sign, ratify, or adhere to this Declaration.

Under its terms the Declaration was not binding on any of the belligerents in the World War of 1914 from the date of the beginning of the war between San Marino (not a party) and Austria-Hungary, on June 3, 1915. Other belligerent States not parties were: United States of America, Panama, Cuba, Brazil, Liberia, Guatemala, Costa Rica, Haiti, and Honduras.

Garner, after reviewing the charges during the World War of 1914, made by belligerents on each side that their adversaries violated this convention, especially in the use of "dum-dum" bullets, concluded that "the evidence at hand . . . does not indicate that any general use of the type of bullet forbidden by the Hague Convention [*sic*] was authorized by any belligerent, or that it was in fact used except perhaps in occasional instances. Ordinance experts point out that any soldier can easily 'dum-dum' an ordinary bullet without the

The contracting Parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

The present Declaration is only binding for the contracting Powers in the case of a war between two or more of them.

It shall cease to be binding from the time when, in a war between the contracting Powers, one of the belligerents is joined by a non-contracting Power.

[Provisions as to ratification, adhesion, and so on, and the signatures, are omitted.]

§ 156. FORBIDDEN WEAPONS: GASES, BACTERIA, AND THE LIKE

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare

SIGNED AT GENEVA, JUNE 17, 1925; CAME INTO FORCE APRIL 3, 1928¹

Text from 25 *American Journal of International Law* (April, 1931), 94, which reproduces *British Treaty Series*, No. 24 (1930), Cmd. 3604.

The undersigned plenipotentiaries, in the name of their respective governments:

Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world; and

Whereas the prohibition of such use has been declared in treaties to which the majority of Powers of the world are parties;² and

knowledge of his superiors and thus convert it into a forbidden instrument."—*International Law and the World War*, I, 268-269.

See the Regulations annexed to Hague Convention (IV) of 1907, Article 23 (e) above, page 763.—Ed.

¹ This Protocol has been ratified or adhered to by the following States or Members of the League of Nations: Australia, Austria, Belgium, British Empire, Bulgaria, Canada, Chile, China, Czecho-Slovakia, Denmark, Egypt, Estonia, Ethiopia, Finland, France, Germany, Greece, India, Iraq, Irish Free State, Italy, Latvia, Liberia, Lithuania, Luxemburg, Mexico, Netherlands, New Zealand, Norway, Persia, Poland, Portugal, Roumania, South Africa, Soviet Union, Siam, Spain, Sweden, Switzerland, Turkey, Venezuela, and Yugoslavia. A number of States, including the British Empire, France, and the Soviet Union, made reservations with respect to States which have not ratified or acceded to the Protocol or which do not respect its provisions. The United States signed the Protocol but did not ratify it. (All information as of August, 1939.)—Ed.

² The treaties referred to include the following:

1. *Declaration (IV, 2) Concerning Asphyxiating Gases*, signed at The Hague, July 29, 1899. "The contracting Powers agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases. The present Declaration is only binding on the contracting Powers in the case of a war between two or more of them. It shall cease to be binding from the time when, in a war between the contracting Powers,

To the end that this prohibition shall be universally accepted as a part of international law, binding alike the conscience and the practice of nations;

DECLARE:

That the high contracting parties, so far as they are not already parties to treaties prohibiting such use, accept this prohibition, agree to

one of the belligerents shall be joined by a non-contracting Power. . . .”—Scott, *Hague Conventions and Declarations*, p. 225. While this Declaration was ratified or adhered to by most of the belligerents in the World War of 1914, the United States was not a party. Neither, it would appear, was San Marino, whose war with Austria-Hungary began June 3, 1915. Thus the Declaration was not technically binding from this date, under its terms. The forbidden projectiles were used by both sides. For the controversies concerning them, see Garner, *International Law and the World War*, I, 284-287. States now (1939) bound by this Declaration are: Belgium, Bulgaria, China, Denmark, France, Germany, Great Britain, Greece, Italy, Japan, Luxemburg, Mexico, Montenegro, Netherlands, Nicaragua, Norway, Persia, Portugal, Roumania, Russia, Serbia, Siam, Spain, Sweden, Switzerland, and Turkey. There have been no denunciations.

2. The *Hague Regulations Respecting the Laws and Customs of War on Land*, signed October 18, 1907, provided: "Art. 23. Besides the prohibitions provided by special Conventions, it is especially prohibited: (a) To employ poison or poisoned arms; . . . (c) to employ arms, projectiles, or material of a nature to cause superfluous injury; . . ." For the status of these Regulations in 1914 and at present (1939) see Note 1 to § 154 at page 754. As indicated below, these provisions did not suffice to prevent the use of projectiles diffusing gases, during the World War of 1914.

3. Article 171 of the Treaty of Versailles, between Germany on the one hand and Great Britain, France, Italy, Japan, and the United States on the other. This provided that "the use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices being prohibited, their manufacture and importation are strictly forbidden in Germany." While the United States did not ratify the Treaty of Versailles, its Treaty of Berlin with Germany stipulated that the United States should enjoy the "rights and advantages" of Part V of the Treaty of Versailles, which includes Article 171. *U.S.T.S.*, No. 658. *Query*: Is the United States bound under the first clause of Article 171?

4. The unratified Treaty of Washington, signed by representatives of the United States, the British Empire, France, Italy, and Japan, February 6, 1922, contained provisions relating to the use of submarines as well as to the use of noxious gases in warfare. Objections to its ratification appeared to be based on its provisions relating to submarines (see § 170, note 3). Its Article 5 speaks of the use of gases as having already been condemned: "The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world and a prohibition of such use having been declared in treaties to which a majority of the civilized Powers are parties, the Signatory Powers, to the end that this prohibition shall be universally accepted as a part of international law binding alike the conscience and practice of nations, declare their assent to such prohibition, agree to be bound thereby as between themselves and invite all other civilized nations to adhere thereto."—Hudson, *International Legislation*, II, 794, at 797.

It is to be supposed that the wretchedly drafted and widely ratified Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, which came into force April 3, 1928, taken in connection with the other instruments enumerated above, has the effect of making the prohibition of asphyxiating and poisonous gases binding upon almost all States, and of extending it to bacteriological methods of warfare as far as the ratifying and adhering States are concerned. Nevertheless, gases were used by Italy against Ethiopia, 1935-1936, as a principal instrument of warfare, and with decisive effect. So far as there was justification, it appears to be the familiar one of reprisals. Italy and Ethiopia were both parties to the Protocol of 1925 and those discussed in 1 and 2 above. See J. H. Spencer, "Some Legal Aspects of Aircraft in Belligerent Operations," *Proceedings*, American Society of International Law, 1937, p. 95.

The single uncontroverted fact which seems to emerge from the controversies about gases from 1915 to the end of the World War, is that they were used by all the belligerents. It is generally said that their use was begun by the Germans on April 22, 1915, during the second Battle of Ypres, though there are German claims that the Allies used them first. At

extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration.

The high contracting parties will exert every effort to induce other states to accede to the present protocol. Such accession will be notified to the Government of the French Republic, and by the latter to all signatory and acceding Powers, and will take effect on the date of the notification by the Government of the French Republic.

[Provisions concerning ratifications, signatures, and certain declarations are omitted.]

§ 157. FORBIDDEN WEAPONS: AERIAL PROJECTILES AND EXPLOSIVES

Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons

SIGNED AT THE HAGUE, OCTOBER 18, 1907¹

Text from J. B. Scott, *Hague Conventions and Declarations of 1899 and 1907* (1915), pp. 221-222.

The undersigned . . .

Declare:

The contracting Powers agree to prohibit, for a period extending to the

any rate, the British retaliated in kind not later than September, 1915. On the whole subject see Garner, *International Law and the World War*, I, 271. It should be pointed out, however, that the law in 1914 was not at all clear or complete. Though States were not technically bound by any of the conventional stipulations which applied to gases, it was possible to argue that even under them many uses of gas were permissible. Thus, Hague Declaration (IV, 2) of 1899 bound States to abstain only from the use of "projectiles," the sole object of which was the diffusion of gases. It does not forbid the emission of clouds of gas by other means than projectiles, nor even of projectiles which produce damage through their explosive effects while at the same time emitting gases. In the same way the Hague Regulations of 1907 respecting the Laws and Customs of War on Land, prohibited the employment (Art. 23 [a]) of "poison or poisoned" arms. Does this prohibition include gases at all? If it does, does it include gases which temporarily incapacitate their victims? Is "poison" present only when the victim unknowingly is made subject to it? Are weapons which produce their effects without the tactile contact of a projectile and the victim, "poisoned arms"? Again, Article 23 (e) of the Regulations prohibited the employment of arms, projectiles, or material causing unnecessary suffering. In the absence of more precise conventional definitions, there will always be controversy as to what is unnecessary suffering. Military men will always contend that injury necessary to put men out of action is not superfluous, even if such injury causes great suffering and slow agonizing death.

¹ The following States have ratified or adhered to this Declaration: Belgium, Bolivia, Brazil, China, El Salvador, Ethiopia (adhered August 9, 1935), Finland (adhered June 9, 1922), Great Britain, Haiti, Liberia, Luxemburg, Netherlands, Nicaragua, Norway, Panama, Portugal, Siam, Switzerland, and the United States of America. (As of August, 1939.)

Lauterpacht's edition of Oppenheim discusses this Declaration in the following terms: "The First Hague Conference . . . adopted . . . a Declaration . . . prohibiting for a term of five years the launching of projectiles or explosives from balloons or other kinds of aerial

close of the Third Peace Conference, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature.

The present Declaration is only binding on the contracting Powers in case of war between two or more of them.

It shall cease to be binding from the time when, in a war between the contracting Powers, one of the belligerents is joined by a non-contracting Power. . . .

In the event of one of the high contracting Parties denouncing the present Declaration, such denunciation shall not take effect until a year after the notification made in writing to the Netherland Government, and forthwith communicated by it to all the other contracting Powers.

This denunciation shall only have effect in regard to the notifying Powers. . . .

[Provisions for ratification and adhesion and names of signatories omitted.]

§ 158. GENEVA ("RED CROSS") CONVENTION OF 1929

The first "Geneva Convention" for the Amelioration of the Condition of Soldiers wounded in Armies in the Field was signed August 22, 1864, by the representatives of twelve States, but ultimately all civilized States, with the exception of Costa Rica, Monaco, and Lichtenstein, became parties.

The second "Geneva Convention" for the Amelioration of the Condition of the Wounded in Armies in the Field was signed at Geneva July 6, 1906. It was widely adopted, but under its Article 24 its provisions ceased "to be obligatory from the time when one of the belligerent powers should not be signatory to the Convention." It was not technically binding during the World War of 1914, because not all the belligerents were signatories. This of course did not affect the binding character of the Convention of 1864, although Costa Rica acceded to the Convention of 1906 and not to the Convention of 1864. The provisions of both Conventions were violated during the World War of 1914. It appears, however, that belligerents did not argue that the Conventions were not binding. Rather, each of them contended that while it scrupulously observed the principles of the Geneva Convention, its opponents were guilty of flagrant violations of these principles. Later violations were justified on grounds of retaliation. The charges made by the belligerents included (1) firing on stretcher bearers, ambulances, and hospitals; (2) misuse of the Red Cross insignia, such as transporting

vessels. The Second Hague Conference, on October 18, 1907, had renewed this Declaration *up to the close of the Third Hague Conference*; but out of twenty-seven States which signed it, only a few (among them Great Britain and the United States of America) had ratified it before the World War, and Germany, France, Italy, Japan, Russia—not to mention smaller Powers—did not even sign it. When the World War broke out, not one of the Central Powers had ratified the Declaration; its provisions were not binding, and were not observed."—*International Law*, 5th Ed. (1935), II, p. 287. The same may be said of the Italo-Ethiopian and Sino-Japanese conflicts, the Spanish Civil War, and the European War of 1939.

See Article 25 of the *Regulations Respecting the Laws and Customs of War on Land* (page 764) and the code of Air Warfare Rules proposed in 1923 (§ 159).—Ed.

munitions in ambulances; (3) mutilating and killing the wounded. The accused belligerent generally alleged mistake: e.g., that in dropping bombs on concentration points where there were hospitals, it was difficult for an airman to prevent damage to the hospitals, especially at night. The other standard rejoinder was that the ambulance, hospital, or other instrumentality was being used for military purposes, contrary to the Convention. See Garner, *International Law and the World War*, Vol. I, Chap. XX. The States thought well enough of the operation of the Convention of 1906 during the wars of 1914-1918 to ratify the improved Convention of 1929; but Ethiopia and Italy in 1935-1936 exchanged the same charges and countercharges that appeared in 1914-1918. See J. H. Spencer, "Some Legal Aspects of Aircraft in Belligerent Operations," *Proceedings*, American Society of International Law (1937), pp. 95, 98-100.

For the sinkings of hospital ships, see §§ 171-172, below.

Convention for the Amelioration of the Condition of the Wounded and the Sick of Armies in the Field

SIGNED AT GENEVA, JULY 27, 1929; IN FORCE, JUNE 19, 1931¹

United States Treaty Series, No. 847

[The names of contracting Heads of States are omitted.]

... equally desirous of diminishing, so far as lies within their power, the evils inseparable from war, and wishing to perfect and complete, for this purpose, the provisions agreed upon at Geneva, August 22, 1864, and July 6, 1906, to ameliorate the condition of the wounded and the sick of armies in the field,

Have decided to conclude a new Convention for this purpose, and have appointed the following as their plenipotentiaries, namely: [Names of plenipotentiaries are omitted.]

Who, after having communicated to each other their full powers, found to be in good and due form, have agreed as follows:

CHAPTER I. *The Wounded and Sick*

ARTICLE I. Officers, soldiers, and other persons officially attached to the armies who are wounded or sick shall be respected and protected in all circumstances; they shall be humanely treated and cared for without distinction of nationality by the belligerent in whose power they are.

A belligerent, however, when compelled to leave his wounded or sick in the hands of his adversary, shall leave with them, so far as military exigencies

¹ Under the terms of its Article 34, this Convention "shall replace the Conventions of August 22, 1864, and of July 6, 1906, in the relations between the contracting Parties." States and Members of the League of Nations which have ratified or adhered are: Austria, Australia, Belgium, Bolivia, Brazil, Bulgaria, Canada, Chile, China, Czechoslovakia, Danzig, Denmark, Egypt, Estonia, Ethiopia, Finland, France, Germany, Great Britain, Greece, India, Iraq, Italy, Japan, Latvia, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Roumania, Spain, Siam, Sweden, Switzerland, Turkey, Union of South Africa, U.S.S.R., United States of America, and Yugoslavia. (As of August, 1939.)

permit, a portion of the personnel and matériel of his sanitary service to assist in caring for them.

ARTICLE 2. Subject to the care that must be taken of them under the preceding article, the wounded and sick of an army who fall into the power of the other belligerent shall become prisoners of war, and the general rules of international law in respect to prisoners of war shall become applicable to them.

The belligerents shall remain free, however, to agree upon such clauses to the benefit of the wounded and sick prisoners as they may deem of value over and above already existing obligations.

ARTICLE 3. After every engagement, the belligerent who remains in possession of the field of battle shall take measures to search for the wounded and the dead and to protect them from robbery and ill-treatment.

A local armistice or cessation of fire to enable the removal of wounded left between the lines shall be arranged whenever circumstances permit.

ARTICLE 4. Belligerents shall mutually forward to each other as soon as possible the names of the wounded, sick and dead taken in charge or discovered by them, as well as all indications which may serve for their identification.

They shall draw up and forward to each other death certificates.

They shall collect and likewise forward to each other all objects of personal use found on the field of battle or on the dead, especially one-half of their identity plaque, the other half remaining attached to the body.

They shall see that a careful examination, if possible, medical, is made of the bodies of the dead prior to their interment or cremation, with a view to verifying their death, establishing their identity, and in order to be able to furnish a report thereon.

They shall further see that they are honorably buried and that the graves are treated with respect and may always be found again.

For this purpose, and at the outbreak of hostilities, they shall officially organize a service of graves in order to render any later exhumation possible and to make certain of the identity of bodies even though they may have been moved from grave to grave.

Upon the termination of hostilities, they shall exchange lists of graves and of dead buried in their cemeteries and elsewhere.

ARTICLE 5. The military authority may make an appeal to the charitable zeal of the inhabitants to receive and, under its supervision, to care for, the wounded or sick of the armies, granting to persons responding to such appeals special protection and certain facilities.

CHAPTER II. *Sanitary Formations and Establishments*

ARTICLE 6. Mobile sanitary formations, i. e., those which are intended to accompany armies in the field, and the fixed establishments belonging to the sanitary service shall be protected and respected by the belligerents.

ARTICLE 7. The protection due to sanitary formations and establishments shall cease if they are used to commit acts injurious to the enemy.

ARTICLE 8. A sanitary formation or establishment shall not be deprived of the protection accorded by Article 6 by the fact:

- 1) that the personnel of the formation or establishment is armed and uses its arms in self-defense or in defense of its wounded and sick;
- 2) that in the absence of armed hospital attendants the formation is guarded by an armed detachment or by sentinels;
- 3) that hand firearms or ammunition taken from the wounded and sick and not yet turned over to the proper authorities are found in the formation or establishment;
- 4) that there is found in the formation or establishment personnel or matériel of the veterinary service which does not integrally belong to it.

CHAPTER III. *Personnel*

ARTICLE 9. The personnel charged exclusively with the removal, transportation, and treatment of the wounded and sick, as well as with the administration of sanitary formations and establishments, and the chaplains attached to armies, shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be treated as prisoners of war.

Military personnel which has received special instructions to be used when necessary as auxiliary attendants or litter bearers in the removal, transportation and treatment of the wounded and sick, and bearing an identification document, shall benefit by the same conditions as the permanent sanitary personnel if they are captured at the moment when they are fulfilling these functions.

ARTICLE 10. The personnel of volunteer aid societies, duly recognized and authorized by their Government, who are employed in the same functions as the personnel contemplated in Article 9, paragraph 1, are assimilated to that personnel upon condition that the said societies shall be subject to military laws and regulations.

Each High Contracting Party shall make known to the other, either in time of peace or at the opening or during the progress of hostilities, and in any case before actual employment, the names of the societies which it has authorized to render assistance, under its responsibility, in the official sanitary service of its armies.

ARTICLE 11. A recognized society of a neutral country may only lend the services of its sanitary personnel and formations to a belligerent with the prior consent of its own Government and the authority of such belligerent.

The belligerent who has accepted such assistance shall be required to notify the enemy before making any use thereof.

ARTICLE 12. The persons described in Articles 9, 10 and 11 may not be detained after they have fallen into the power of the adversary.

Unless there is an agreement to the contrary, they shall be sent back to the belligerent to whose service they are attached as soon as a way is open for their return and military exigencies permit.

While waiting to be returned, they shall continue in the exercise of their functions under the direction of the adversary; they shall be assigned preferably to the care of the wounded and sick of the belligerent to whose service they are attached.

At the time of their departure they may carry with them such effects, instruments, arms and means of transport as belong to them.

ARTICLE 13. While they remain in their power, belligerents shall secure to the personnel mentioned in Articles 9, 10 and 11, the same maintenance and quarters, pay and allowances, as to persons of corresponding rank in their own armies.

At the outbreak of hostilities the belligerents shall reach an understanding on the corresponding ranks of their sanitary personnel.

CHAPTER IV. *Buildings and Matériel*

ARTICLE 14. If mobile sanitary formations, whatever may be their nature, fall into the power of the adversary, they shall retain their matériel, their means of transportation, and their conducting personnel.

The competent military authority, however, shall have the right to employ them in caring for the wounded and sick; restitution shall take place in accordance with the conditions prescribed for the sanitary personnel and as far as possible at the same time.

ARTICLE 15. Buildings and matériel of the fixed sanitary establishments of the army shall remain subject to the laws of war, but may not be diverted from their use so long as they are necessary for the wounded and sick.

However, commanders of troops engaged in operations may use them in case of urgent military necessity if, before such use, the wounded and sick treated there have been provided for.

ARTICLE 16. The buildings of aid societies admitted to the benefits of the Convention shall be regarded as private property.

The matériel of these societies, irrespective of its location, shall likewise be regarded as private property.

The right of requisition recognized to belligerents by the laws and

customs of war shall be exercised only in case of urgent necessity and after the wounded and sick have been provided for.

CHAPTER V. *Sanitary Transports*

ARTICLE 17. Vehicles equipped for sanitary evacuation traveling singly or in convoy shall be treated as mobile sanitary formations subject to the following special provisions:

A belligerent intercepting sanitary transportation vehicles, traveling either singly or in convoy, may, if required by military necessity, stop them and break up the convoy, charging himself in all cases with the care of the wounded and sick whom it contains. He may only utilize such vehicles in the sector wherein they were intercepted and exclusively for sanitary needs. When their local mission is at an end, these vehicles must be returned under the conditions stipulated in Article 14.

Military personnel assigned by competent orders for sanitary transportation purposes shall be returned under the conditions stipulated in Article 12 for sanitary personnel, and subject to the provisions of the last paragraph of Article 18.

All means of transportation especially organized for evacuation purposes, as well as their appurtenances attached to the sanitary service, shall be returned in conformity with the provisions of Chapter IV.

Military means of transportation and their teams, other than those belonging to the sanitary service, may be captured.

The civil personnel and all means of transportation obtained by requisition shall be subject to the general rules of international law.

ARTICLE 18. Aircraft used as a means of sanitary transportation shall enjoy the protection of the Convention during such time as they are exclusively reserved for the evacuation of wounded and sick and for the transportation of sanitary personnel and matériel.

They shall be painted in white and shall bear clearly visible the distinctive sign mentioned in Article 19 alongside of the national colors on their upper and lower surfaces.

Excepting with special and express permission, a flight over the firing-line, as well as over the zone situated in front of the major medical dressing stations, and in general over any territory under the control of or occupied by the enemy shall be forbidden.

Sanitary aircraft must comply with all summons to land.

In the case of a landing thus required or made accidentally upon territory occupied by the enemy, the wounded and sick, as well as the sanitary personnel and matériel, including the aircraft, shall benefit by the provisions of the present Convention.

The pilot, mechanics, and wireless operators who have been captured

shall be returned on condition of only being utilized in the sanitary service until the termination of hostilities.

CHAPTER VI. *The Distinctive Sign*

ARTICLE 19. Out of respect to Switzerland the heraldic emblem of the red cross on a white ground, formed by the reversal of the Federal colors, is continued as the emblem and distinctive sign of the sanitary service of armies.

However, for countries which already use, as a distinctive sign, in place of the red cross, the red crescent or the red lion and sun on a white field, these emblems shall likewise be recognized within the meaning of the present Convention.

ARTICLE 20. The emblem shall appear on flags and brassards, as well as upon all matériel, appertaining to the sanitary service, with the permission of the competent military authority.

ARTICLE 21. The personnel protected in virtue of the first paragraph of Article 9 and Articles 10 and 11 shall wear attached to the left arm a brassard bearing the distinctive sign, issued and stamped by a competent military authority.

The personnel mentioned in Article 9, paragraphs 1 and 2, shall be furnished with an identification document consisting either of an inscription in their military booklet or a special document.

Persons mentioned in Articles 10 and 11 who do not wear military uniform shall be furnished by competent military authority with a certificate of identity containing their photograph and attesting to their sanitary status.

Identification documents must be uniform and of the same type in each army.

The sanitary personnel may in no case be deprived of their insignia nor of their own identification papers.

In case of loss they shall have the right to obtain duplicates.

ARTICLE 22. The distinctive flag of the Convention may only be displayed over the sanitary formations and establishments which the Convention provides shall be respected, and with the consent of the military authorities. In fixed establishments it shall, and in mobile formations it may, be accompanied by the national flag of the belligerent to whose service the formation or establishment is attached.

Sanitary formations which have fallen into the power of the enemy, however, shall fly no other flag than that of the Convention as long as they continue in that situation.

The belligerents, in so far as military exigencies allow, shall take such measures as may be necessary to render the distinctive emblems marking sanitary formations and establishments plainly visible to the land, air and sea forces of the enemy, with a view to preventing the possibility of any aggressive action.

ARTICLE 23. The sanitary formations of neutral countries which, under the conditions set forth in Article 11, have been authorized to render their services, shall fly, with the flag of the Convention, the national flag of the belligerent to which they are attached.

They shall have the right during such time as they are rendering service to a belligerent to fly their own national flag also.

The provisions of the second paragraph of the preceding article are applicable to them.

ARTICLE 24. The emblem of the red cross on a white ground and the words *Red Cross* or *Geneva Cross* may be used, whether in time of peace or war, only to protect or designate sanitary formations and establishments, the personnel and matériel protected by the Convention.

The same shall apply with respect to the emblems mentioned in the second paragraph of Article 19 for such countries as use them.

Moreover, the volunteer aid societies provided for under Article 10 may, in conformity with their national legislation, employ the distinctive emblem for their humanitarian activities in time of peace.

As an exceptional measure and with the specific authorization of one of the national Red Cross Societies (Red Crescent, Red Lion and Sun), the use of the emblem of the Convention may be allowed in peace time to designate the location of relief stations reserved exclusively to giving free assistance to wounded or sick.

CHAPTER VII. *The Application and Execution of the Convention*

ARTICLE 25. The provisions of the present Convention shall be respected by the High Contracting Parties under all circumstances.

If, in time of war, a belligerent is not a party to the Convention, its provisions shall nevertheless remain in force as between all the belligerents who are parties to the Convention.

ARTICLE 26. It shall be the duty of the commanders-in-chief of the belligerent armies to provide for the details of execution of the foregoing articles, as well as for unforeseen cases, in accordance with the instructions of their respective Governments, and conformably to the general principles of this Convention.

ARTICLE 27. The High Contracting Parties shall take the necessary steps to acquaint their troops, and particularly the protected personnel, with the provisions of this Convention, and to make them known to the people at large.

CHAPTER VIII. *The Repression of Abuses and Infractions*

ARTICLE 28. The Governments of the High Contracting Parties whose legislation may not now be adequate shall take or shall recommend to their legislatures such measures as may be necessary at all times:

a) to prevent the use by private persons or by societies other than those upon which this Convention confers the right thereto, of the emblem or of the name of the *Red Cross* or *Geneva Cross*, as well as any other sign or designation constituting an imitation thereof, whether for commercial or other purposes;

b) by reason of the homage rendered to Switzerland as a result of the adoption of the inverted Federal colors, to prevent the use, by private persons or by organizations, of the arms of the Swiss Confederation or of signs constituting an imitation thereof, whether as trade-marks, commercial labels, or portions thereof, or in any way contrary to commercial ethics, or under conditions wounding Swiss national pride.

The prohibition mentioned in subparagraph a) of the use of signs or designations constituting an imitation of the emblem or designation of the *Red Cross* or *Geneva Cross*, as well as the prohibition mentioned in subparagraph b) of the use of the arms of the Swiss Confederation or signs constituting an imitation thereof, shall take effect from the time set in each act of legislation and at the latest five years after this Convention goes into effect. After such going into effect it shall be unlawful to take out a trade-mark or commercial label contrary to such prohibitions.

ARTICLE 29. The Governments of the High Contracting Parties whose penal laws may not be adequate, shall likewise take or recommend to their legislatures the necessary measures to repress in time of war all acts in contravention of the provisions of the present Convention.

They shall communicate to one another through the Swiss Federal Council the measures taken with a view to such repression, not later than five years from the date of the ratification of the present Convention.

ARTICLE 30. At the request of a belligerent, an investigation must be held, in such manner as shall be agreed upon by the interested parties, concerning any alleged violation of the Convention; whenever such a violation is proved, the belligerents shall put an end to it and repress it as promptly as possible.

[Articles 31-33 are omitted.]

ARTICLE 34. The present Convention shall replace the Conventions of August 22, 1864, and of July 6, 1906, in the relations between the High Contracting Parties.

[Articles 35 and 36 are omitted.]

ARTICLE 37. A state of war shall give immediate effect to ratifications deposited or adhesions notified by belligerent Powers prior to or after the outbreak of hostilities. The communication of ratifications or adhesions received from Powers at war shall be made by the Swiss Federal Council by the most rapid method.

ARTICLE 38. Each of the High Contracting Parties shall have the right to denounce the present Convention. The denunciation shall not take effect until one year after notification has been made in writing to the Swiss Federal Council. The latter shall communicate such notification to the Governments of all the High Contracting Parties.

The denunciation shall have effect only with respect to the High Contracting Party which gave notification of it.

Moreover, such denunciation shall not take effect during a war in which the denouncing Power is involved. In this case, the present Convention shall continue in effect, beyond the period of one year, until the conclusion of peace.

[Article 39, the signatures, and certain declarations are omitted.]

§ 159. RADIO AND AIRCRAFT IN WAR

Since many of the rules proposed below are applications of the rules of neutrality, some students may wish to study them after consideration of the materials in Chapter XVIII.

The Conference on the Limitation of Armament at Washington in 1912 adopted a resolution for the appointment of a Commission representing the United States, the British Empire, France, Italy, and Japan to consider whether existing rules of international law adequately covered new methods of attack or defense resulting from the introduction or development, since the Hague Conference of 1907, of new agencies of warfare; and, if so, what changes in the existing rules should be adopted.

This Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare, on February 19, 1923, made a Report, the text of the articles of which, with certain comments, is printed below. A text with the full comments of the Commission may be found in 32 *A.J.I.L. (Supp., 1938)*, 1-56. The Report consists of Part I, Rules for the Control of Radio in Time of War, and Part II, Rules of Aërial Warfare.

These rules are not embodied in a treaty accepted by States, and are not international law (1939). In some respects they are probably already out of date. They are presented as embodying the most advanced thought of jurists at the time as to the problems considered. For a discussion of further problems, see *Proceedings*, American Society of International Law (1937), p. 124.

General Report of the Commission of Jurists at The Hague, 1923.

Text supplied by the Department of State, as reprinted in 17 *American Journal of International Law (Supp., 1923)*, 242-260.

PART I

Rules for the Control of Radio in Time of War

The regulation of the use of radio in time of war is not a new question. Several international conventions already contain provisions on the subject, but the ever increasing development of this means of communication has rendered

it necessary that the whole matter should be reconsidered, with the object of completing and coordinating existing texts. This is the more important in view of the fact that several of the existing international conventions have not been ratified by all the Powers.

The articles of the existing conventions which deal directly or indirectly with radio telegraphy in time of war are as follows:

The Land War Neutrality Convention (No. V of 1907) prohibits in Article 3 the erecting of radio stations by belligerents on neutral territory and also the use by belligerents of any radio station established on neutral territory before the war for purely military purposes and not previously opened for the service of public messages. Article 5 obliges the neutral Power not to allow any such proceeding by a belligerent.

Under Article 8 a neutral Power is not bound to forbid or restrict the employment on behalf of belligerents of radio stations belonging to it or to companies or private individuals.

Under Article 9 the neutral Power must apply to the belligerents impartially the measures taken by it under Article 8 and must enforce them on private owners of radio stations.

Article 8 of the Convention for the Adaptation of the Geneva Convention to Maritime Warfare (No. X of 1907) provides that the presence of a radio installation on board a hospital ship does not of itself justify the withdrawal of the protection to which a hospital ship is entitled so long as she does not commit acts harmful to the enemy.

Under the Convention concerning Neutral Rights and Duties in Maritime Warfare (No. XIII of 1907) belligerents are forbidden, as part of the general prohibition of the use of neutral ports and waters as a base of naval operations, to erect radio stations therein, and under Article 25 a neutral Power is bound to exercise such supervision as the means at its disposal permit to prevent any violation of this provision.

The unratified Declaration of London of 1909, which was signed by the Powers represented in the Naval Conference as embodying rules which corresponded in substance with the generally recognized principles of international law, specified in Articles 45 and 46 certain acts in which the use of radio telegraphy might play an important part as acts of unneutral service. Under Article 45 a neutral vessel was to be liable to condemnation if she was on a voyage specially undertaken with a view to the transmission of intelligence in the interest of the enemy. Under Article 46 a neutral vessel was to be condemned and receive the same treatment as would be applicable to an enemy merchant vessel if she took a direct part in hostilities or was at the time exclusively devoted to the transmission of intelligence in the interest of the enemy. It should be borne in mind that by Article 16 of the Rules for Aerial Warfare an aircraft is deemed to be engaged in hostilities if in the interests of the enemy she transmits intelligence in the course of her flight.

The following provisions have a bearing on the question of the control of radio in time of war, though the conventions relate principally to radio in time

of peace. These provisions are Articles 8, 9 and 17 of the International Radio Telegraphic Convention of London of 1912. Of these provisions Article 8 stipulates that the working of radio telegraph stations shall be organized as far as possible in such a manner as not to disturb the service of other radio stations. Article 9 deals with the priority and prompt treatment of calls of distress. Article 17 renders applicable to radio telegraphy certain provisions of the International Telegraphic Convention of St. Petersburg of 1875. Among the provisions of the convention of 1875 made applicable to radio telegraphy is Article 7, under which the high contracting parties reserve to themselves the right to stop the transmission of any private telegram which appears to be dangerous to the security of the state or contrary to the laws of the country, to public order or to decency. Under Article 8, each government reserves to itself the power to interrupt, either totally or partially, the system of the international telegraphs for an indefinite period if it thinks necessary, provided that it immediately advises each of the other contracting governments.

Regard has also been given to the terms of the Convention for the Safety of Life at Sea, London, 1914.

With regard to the radio telegraphy conventions applicable in time of peace, it should be remembered that these have not been revised since 1912 and that it is not unlikely that a conference may before long be summoned for the purpose of effecting such revision.

The work of the Commission in framing the following rules for the control of radio in time of war has been facilitated by the preparation and submission to the Commission on behalf of the American Delegation of a draft code of rules. This draft has been used as the basis of its work by the Commission.

The first article which has been adopted cannot be appreciated without reference to Article 8 of the Radio Telegraphic Convention of 1912. This latter article enunciates the broad principle that the operation of radio stations must be organized as far as possible in such a manner as not to disturb the service of other stations of the kind. The object of Article 1 is to demonstrate that this principle is equally to prevail in time of war. Needless to say it is not to apply as between radio stations of opposing belligerents. In the same way as in time of peace the general principle cannot be applied absolutely, so also in time of war it can only be observed "as far as possible."

ARTICLE 1. In time of war the working of radio stations shall continue to be organized, as far as possible, in such manner as not to disturb the services of other radio stations. This provision does not apply as between the radio stations of opposing belligerents.

ARTICLE 2. Belligerent and neutral Powers may regulate or prohibit the operation of radio stations within their jurisdiction.

ARTICLE 3. The erection or operation by a belligerent Power or its agents of radio stations within neutral jurisdiction constitutes a violation of neutrality on the part of such belligerent as well as on the part of the neutral Power which permits the erection or operation of such stations.

ARTICLE 4. A neutral Power is not called upon to restrict or prohibit the use of radio stations which are located within its jurisdiction, except so far as may be necessary to prevent the transmission of information destined for a belligerent concerning military forces or military operations and except as prescribed by Article 5.

All restrictive or prohibitive measures taken by a neutral Power shall be applied impartially by it to the belligerents.

ARTICLE 5. Belligerent mobile radio stations are bound within the jurisdiction of a neutral state to abstain from all use of their radio apparatus. Neutral governments are bound to employ the means at their disposal to prevent such use.

ARTICLE 6. 1. The transmission by radio by a vessel or an aircraft, whether enemy or neutral, when on or over the high seas of military intelligence for the immediate use of a belligerent is to be deemed a hostile act and will render the vessel or aircraft liable to be fired upon.

2. A neutral vessel or neutral aircraft which transmits when on or over the high seas information destined for a belligerent concerning military operations or military forces shall be liable to capture. The prize court may condemn the vessel or aircraft if it considers that the circumstances justify condemnation.

3. Liability to capture of a neutral vessel or aircraft on account of the acts referred to in paragraphs 1 and 2 is not extinguished by the conclusion of the voyage or flight on which the vessel or aircraft was engaged at the time, but shall subsist for a period of one year after the act complained of.

ARTICLE 7. In case a belligerent commanding officer considers that the success of the operation in which he is engaged may be prejudiced by the presence of vessels or aircraft equipped with radio installations in the immediate vicinity of his armed forces or by the use of such installations therein, he may order neutral vessels or neutral aircraft on or over the high seas:

1. To alter their course to such an extent as will be necessary to prevent their approaching the armed forces operating under his command; or

2. not to make use of their radio transmitting apparatus while in the immediate vicinity of such forces.

A neutral vessel or neutral aircraft, which does not conform to such direction of which it has had notice, exposes itself to the risk of being fired upon. It will also be liable to capture, and may be condemned if the prize court considers that the circumstances justify condemnation.

ARTICLE 8. Neutral mobile radio stations shall refrain from keeping any record of radio messages received from belligerent military radio stations, unless such messages are addressed to themselves.

Violation of this rule will justify the removal by the belligerent of the records of such intercepted messages.

ARTICLE 9. Belligerents are under obligation to comply with the provisions of international conventions in regard to distress signals and distress messages so far as their military operations permit.

Nothing in these rules shall be understood to relieve a belligerent from such obligation or to prohibit the transmission of distress signals, distress messages and messages which are indispensable to the safety of navigation.

ARTICLE 10. The perversion of radio distress signals and distress messages prescribed by international conventions to other than their normal and legitimate purposes constitutes a violation of the laws of war and renders the perpetrator personally responsible under international law.

ARTICLE 11. Acts not otherwise constituting espionage are not espionage by reason of their involving violation of these rules.

ARTICLE 12. Radio operators incur no personal responsibility from the mere fact of carrying out the orders which they receive in the performance of their duties as operators.

PART II

*Rules of Aerial Warfare*¹

In the preparation of the code of rules of aerial warfare the Commission worked on the basis of a draft submitted by the American Delegation. A similar draft, covering in general the same ground, was submitted by the British Delegation. In the discussion of the various articles adopted by the Commission the provisions contained in each of these drafts were taken into consideration, as well as amendments and proposals submitted by other delegations.

CHAPTER I

Applicability: Classification and Marks

No attempt has been made to formulate a definition of the term "aircraft," nor to enumerate the various categories of machines which are covered by the term. A statement of the broad principle that the rules adopted apply to all types of aircraft has been thought sufficient, and Article 1 has been framed for this purpose.

ARTICLE 1. The rules of aerial warfare apply to all aircraft, whether lighter or heavier than air, irrespective of whether they are, or are not, capable of floating on the water.

ARTICLE 2. The following shall be deemed to be public aircraft:

(a) military aircraft;

¹ For practices in 1914-1918, see Garner, *International Law and the World War*, Vol. I, Chap. XIX; in Ethiopia, see J. H. Spencer, "Some Legal Aspects of Aircraft in Belligerent Operations," *Proceedings, A.S.I.L.* (1937), p. 95.—Ed.

(b) non-military aircraft exclusively employed in the public service. All other aircraft shall be deemed to be private aircraft.

ARTICLE 3. A military aircraft shall bear an external mark indicating its nationality and military character.

ARTICLE 4. A public non-military aircraft employed for customs or police purposes shall carry papers evidencing the fact that it is exclusively employed in the public service. Such an aircraft shall bear an external mark indicating its nationality and its public non-military character.

ARTICLE 5. Public non-military aircraft other than those employed for customs or police purposes shall in time of war bear the same external marks, and for the purposes of these rules shall be treated on the same footing, as private aircraft.

ARTICLE 6. Aircraft not comprised in Articles 3 and 4 and deemed to be private aircraft shall carry such papers and bear such external marks as are required by the rules in force in their own country. These marks must indicate their nationality and character.

ARTICLE 7. The external marks required by the above articles shall be so affixed that they cannot be altered in flight. They shall be as large as is practicable and shall be visible from above, from below and from each side.

ARTICLE 8. The external marks, prescribed by the rules in force in each state, shall be notified promptly to all other Powers.

Modifications adopted in time of peace of the rules prescribing external marks shall be notified to all other Powers before they are brought into force.

Modifications of such rules adopted at the outbreak of war or during hostilities shall be notified by each Power as soon as possible to all other Powers and at latest when they are communicated to its own fighting forces.

ARTICLE 9. A belligerent non-military aircraft, whether public or private, may be converted into a military aircraft, provided that the conversion is effected within the jurisdiction of the belligerent state to which the aircraft belongs and not on the high seas.

ARTICLE 10. No aircraft may possess more than one nationality.

CHAPTER II

General Principles

Article 11 embodies the general principle that outside the jurisdiction of any state, *i.e.*, in the air space over the high seas, all aircraft have full freedom of passage. Provisions embodied in other articles which restrict the liberty of individual aircraft are to be regarded as exceptions to this general principle.

ARTICLE 11. Outside the jurisdiction of any state, belligerent or neutral, all aircraft shall have full freedom of passage though the air and of alighting.

ARTICLE 12. In time of war any state, whether belligerent or neutral, may

forbid or regulate the entrance, movement or sojourn of aircraft within its jurisdiction.

CHAPTER III

Belligerents

The use of privateers in naval warfare was abolished by the Declaration of Paris, 1856. Belligerent rights at sea can now only be exercised by units under the direct authority, immediate control and responsibility of the state. This same principle should apply to aerial warfare. Belligerent rights should therefore only be exercised by military aircraft.

ARTICLE 13. Military aircraft are alone entitled to exercise belligerent rights.

ARTICLE 14. A military aircraft shall be under the command of a person duly commissioned or enlisted in the military service of the state; the crew must be exclusively military.

ARTICLE 15. Members of the crew of a military aircraft shall wear a fixed distinctive emblem of such character as to be recognizable at a distance in case they become separated from their aircraft.

ARTICLE 16. No aircraft other than a belligerent military aircraft shall engage in hostilities in any form.

The term "hostilities" includes the transmission during flight of military intelligence for the immediate use of a belligerent.

No private aircraft, when outside the jurisdiction of its own country, shall be armed in time of war.

ARTICLE 17. The principles laid down in the Geneva Convention, 1906, and the convention for the Adaptation of the said Convention to Maritime War (No. X of 1907) shall apply to aerial warfare and to flying ambulances, as well as to the control over flying ambulances exercised by a belligerent commanding officer.

In order to enjoy the protection and privileges allowed to mobile medical units by the Geneva Convention, 1906, flying ambulances must bear the distinctive emblem of the Red Cross in addition to the usual distinguishing marks.

CHAPTER IV

Hostilities

Article 18 is intended to clear up a doubt which arose during the recent war. The use of tracer bullets against aircraft was a general practice in all the contending armies. In the absence of a hard surface on which the bullets will strike, an airman cannot tell whether or not his aim is correct. These bullets were used for the purpose of enabling the airman to correct his aim, as the trail of vapor which they leave behind indicates to him the exact line of fire. In one case, however, combatant airmen were arrested and put on trial on the ground

that the use of these bullets constituted a breach of the existing rules of war laid down by treaty.

The use of incendiary bullets is also necessary as a means of attack against lighter-than-air craft, as it is by setting fire to the gas contained by these aircraft that they can most easily be destroyed.

In the form in which the proposal was first brought forward its provisions were limited to a stipulation that the use of tracer bullets against aircraft generally was not prohibited.

Various criticisms were, however, made about the proposed text, chiefly founded on the impracticability for an airman while in flight to change the ammunition which he is using in the machine gun in his aircraft. He cannot employ different bullets in accordance with the target at which he is aiming, one sort of ammunition for other aircraft and another sort for land forces by whom he may be attacked.

The Commission, therefore, came to the conclusion that the most satisfactory solution of the problem would be to state specifically that the use of tracer, incendiary or explosive projectiles by or against aircraft is not prohibited.

ARTICLE 18. The use of tracer, incendiary or explosive projectiles by or against aircraft is not prohibited.

This provision applies equally to states which are parties to the Declaration of St. Petersburg, 1868, and to those which are not.

ARTICLE 19. The use of false external marks is forbidden.

ARTICLE 20. When an aircraft has been disabled, the occupants when endeavoring to escape by means of a parachute must not be attacked in the course of their descent.

ARTICLE 21. The use of aircraft for the purpose of disseminating propaganda shall not be treated as an illegitimate means of warfare.

Members of the crews of such aircraft must not be deprived of their rights as prisoners of war on the charge that they have committed such an act.

Bombardment

The subject of bombardment by aircraft is one of the most difficult to deal with in framing any code of rules for aerial warfare.

The experiences of the recent war have left in the mind of the world at large a lively horror of the havoc which can be wrought by the indiscriminate launching of bombs and projectiles on the non-combatant populations of towns and cities. The conscience of mankind revolts against this form of making war in places outside the actual theatre of military operations, and the feeling is universal that limitations must be imposed.

On the other hand, it is equally clear that the aircraft is a potent engine of war, and no state which realizes the possibility that it may itself be attacked, and the use to which its adversary may put his air forces can take the risk of fettering its own liberty of action to an extent which would restrict it from

attacking its enemy where that adversary may legitimately be attacked with effect. It is useless, therefore, to enact prohibitions unless there is an equally clear understanding of what constitutes legitimate objects of attack, and it is precisely in this respect that agreement was difficult to reach.

Before passing to a consideration of the articles which have been agreed, mention must be made of the Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons, signed at The Hague in 1907. Three of the states represented on the Commission² are parties to that declaration; the other three are not. Under the terms of this declaration the contracting powers agree to prohibit the discharge of projectiles and explosives from balloons or by other new methods of a similar nature. Its terms are, therefore, wide enough to cover bombardment by aircraft. On the other hand, the scope of the declaration is very limited; in duration it is to last only until the close of the third peace conference, a conference which was to have been summoned for 1914 or 1915, and its application is confined to a war between contracting states without the participation of a non-contracting state.

The existence of this declaration can afford no solution of the problems arising out of the question of bombardment from the air, even for the states which are parties to it.

The number of parties is so small that, even if the declaration were renewed, no confidence could ever be felt that when a war broke out it would apply. A general agreement, therefore, on the subject of bombardment from the air is much to be desired. For the states which are parties to it, however, the declaration exists and it is well that the legal situation should be clearly understood.

As between the parties, it will continue in force and will operate in the event of a war between them, unless by mutual agreement its terms are modified, or an understanding reached that it shall be regarded as replaced by some new conventional stipulation; but it will in any case cease to operate at the moment when a third peace conference concludes its labors, or if any state which is not a party to the declaration intervenes in the war as a belligerent.

No difficulty was found in reaching an agreement that there are certain purposes for which aerial bombardment is inadmissible.

Article 22 has been formulated with this object.

ARTICLE 22. Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants is prohibited.

ARTICLE 23. Aerial bombardment for the purpose of enforcing compliance with requisitions in kind or payment of contributions in money is prohibited.

ARTICLE 24. (1) Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

² United States of America, Great Britain and The Netherlands. [See § 157 above.]

(2) Such bombardment is legitimate only when directed exclusively at the following objectives; military forces; military works; military establishments or depots; factories constituting important well-known centres engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communication or transportation used for military purposes.

(3) The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighborhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph 2 are so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.³

(4) In the immediate neighborhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.

(5) A belligerent state is liable to pay compensation for injuries to person or to property caused by the violation by any of its officers or forces of the provisions of this article.

ARTICLE 25. In bombardment by aircraft, all necessary steps must be taken by the commander to spare as far as possible buildings dedicated to public worship, art, science, or charitable purposes, historic monuments, hospital ships, hospitals and other places where the sick and wounded are collected, provided such buildings, objects or places are not at the time used for military purposes. Such buildings, objects and places must by day be indicated by marks visible to aircraft. The use of marks to indicate other buildings, objects, or places than those specified above is to be deemed an act of perfidy. The marks used as aforesaid shall be in the case of buildings

³ The Greco-German Mixed Arbitral Tribunal in 1927 awarded damages for destruction to private property by a German Zeppelin raid on Salonika in 1916, before Greece declared war on Germany July 2, 1917. Salonika had been occupied by British and French troops since October, 1915. The award was made under Articles 297 and 298 of the Treaty of Versailles, Annex, § 4, which provided for payment of claims "growing out of acts committed by the German Government" since July 31, 1914, and before Greece entered the war, out of the proceeds of German private property in Greece. The Tribunal held that the requirement of warning before attack in Article 26 of the Hague Regulations (see page 764, above) was applicable to bombardments from the air as well as to land bombardments; and that the alleged necessity of surprise in the making of attacks from the air did not alter the conclusion that such attacks without warning were generally inadmissible. The Tribunal stated as a German allegation that the Zeppelin crew knew the location of Salonika's military works, but as facts that the dark night, the height of 3,000 meters, and the "lights out" status of Salonika made it impossible to direct the bombs with the care necessary to protect the homes and business houses of civilians, as required by international law. *Coenca Brothers v. Germany*, VII *Recueil des Décisions des Tribunaux Arbitraux Mixtes*, 683; translated from French in Briggs, *Law of Nations*, 756, and *Annual Digest*, 1927-1928, Case No. 389. Such incidents, when they occur during war, are not customarily submitted to arbitration.—Ed.

protected under the Geneva Convention the red cross on a white ground, and in the case of other protected buildings a large rectangular panel divided diagonally into two pointed triangular portions, one black and the other white.

A belligerent who desires to secure by night the protection for the hospitals and other privileged buildings above mentioned must take the necessary measures to render the special signs referred to sufficiently visible.

ARTICLE 26. The following special rules are adopted for the purpose of enabling states to obtain more efficient protection for important historic monuments situated within their territory, provided that they are willing to refrain from the use of such monuments and a surrounding zone for military purposes, and to accept a special regime for their inspection.

(1) A state shall be entitled, if it sees fit, to establish a zone of protection round such monuments situated in its territory. Such zones shall in time of war enjoy immunity from bombardment.

(2) The monuments round which a zone is to be established shall be notified to other Powers in peace time through the diplomatic channel; the notification shall also indicate the limits of the zones. The notification may not be withdrawn in time of war.

(3) The zone of protection may include, in addition to the area actually occupied by the monument or group of monuments, an outer zone, not exceeding 500 metres in width, measured from the circumference of the said area.

(4) Marks clearly visible from aircraft either by day or by night will be employed for the purpose of ensuring the identification by belligerent airmen of the limits of the zones.

(5) The marks on the monuments themselves will be those defined in Article 25. The marks employed for indicating the surrounding zones will be fixed by each state adopting the provisions of this article, and will be notified to other Powers at the same time as the monuments and zones are notified.

(6) Any abusive use of the marks indicating the zones referred to in paragraph 5 will be regarded as an act of perfidy.

(7) A state adopting the provisions of this article must abstain from using the monument and the surrounding zone for military purposes, or for the benefit in any way whatever of its military organization, or from committing within such monument or zone any act with a military purpose in view.

(8) An inspection committee consisting of three neutral representatives accredited to the state adopting the provisions of this article, or their delegates, shall be appointed for the purpose of ensuring that no violation is committed of the provisions of paragraph 7. One of the members of the

committee of inspection shall be the representative (or his delegate) of the state to which has been entrusted the interests of the opposing belligerent.

Espionage

The articles dealing with espionage follow closely the precedent of the Land Warfare Regulations.

Article 27 is a verbal adaptation of the first paragraph of Article 29 of the Regulations, so phrased as to limit it to acts committed while in the air.

Consideration has been given to the question whether there was any need to add to the provision instances of actions which were not to be deemed acts of espionage, such as those which are given at the end of Article 29 in the Regulations, and it was suggested that Article 29⁴ of the American draft might appropriately be introduced in this manner. It was decided that this was unnecessary. The article submitted by American Delegation was intended to ensure that reconnaissance work openly done behind the enemy lines by aircraft should not be treated as spying. It is not thought likely that any belligerent would attempt to treat it as such.

ARTICLE 27. Any person on board a belligerent or neutral aircraft is to be deemed a spy only if acting clandestinely or on false pretences he obtains or seeks to obtain, while in the air, information within belligerent jurisdiction or in the zone of operations of a belligerent with the intention of communicating it to the hostile party.

ARTICLE 28. Acts of espionage committed after leaving the aircraft by members of the crew of an aircraft or by passengers transported by it are subject to the provisions of the Land Warfare Regulations.

ARTICLE 29. Punishment of the acts of espionage referred to in Articles 27 and 28 is subject to Articles 30 and 31 of the Land Warfare Regulations.

CHAPTER V

Military Authority over Enemy and Neutral Aircraft and Persons on Board

The rapidity of its flight would enable an aircraft to embarrass the operations of land or sea forces, or even operations in the air, to an extent which might prove most inconvenient or even disastrous to a belligerent commander. To protect belligerents from improper intrusions of this kind, it is necessary to authorize belligerent commanders to warn off the intruders, and, if the warning is disregarded, to compel their retirement by opening fire.

It is easy to see that undue hardship might be occasioned to neutrals if advantage were taken of the faculty so conferred on belligerent commanding officers and attempts were made to exclude for long or indefinite periods all neutrals from stipulated areas or to prevent communication between different countries through the air over the high seas. The present provision only au-

⁴ Acts of the personnel of correctly marked enemy aircraft, public or private, done or performed while in the air, are not to be deemed espionage.

thorizes a commanding officer to warn off aircraft during the duration of the operations in which he is engaged at the time. The right of neutral aircraft to circulate in the airspace over the high seas is emphasized by the provision of Article 11 which provides that "outside the jurisdiction of any state, belligerent or neutral, all aircraft shall have full freedom of passage through the air and of alighting."

Article 30 is confined in terms to neutral aircraft, because enemy aircraft are in any event exposed to the risk of capture, and in the vicinity of military operations are subjected to more drastic treatment than that provided by this article.

It will be noticed that the terms of the article are general in character and would comprise even neutral public or military aircraft. It goes without saying that the article is not intended to imply any encroachment on the rights of neutral states. It is assumed that no neutral public or military aircraft would depart so widely from the practice of states as to attempt to interfere with or intrude upon the operations of a belligerent state.

ARTICLE 30. In case a belligerent commanding officer considers that the presence of aircraft is likely to prejudice the success of the operations in which he is engaged at the moment, he may prohibit the passing of neutral aircraft in the immediate vicinity of his forces or may oblige them to follow a particular route. A neutral aircraft which does not conform to such directions, of which it has had notice issued by the belligerent commanding officer, may be fired-upon.

ARTICLE 31. In accordance with the principles of Article 53 of the Land Warfare Regulations, neutral private aircraft found upon entry in the enemy's jurisdiction by a belligerent occupying force may be requisitioned, subject to the payment of full compensation.

ARTICLE 32. Enemy public aircraft, other than those treated on the same footing as private aircraft, shall be subject to confiscation without prize proceedings.

ARTICLE 33. Belligerent non-military aircraft, whether public or private, flying within the jurisdiction of their own state, are liable to be fired upon unless they make the nearest available landing on the approach of enemy military aircraft.

ARTICLE 34. Belligerent non-military aircraft, whether public or private, are liable to be fired upon, if they fly (1) within the jurisdiction of the enemy, or (2) in the immediate vicinity thereof and outside the jurisdiction of their own state or (3) in the immediate vicinity of the military operations of the enemy by land or sea.

ARTICLE 35. Neutral aircraft flying within the jurisdiction of a belligerent, and warned of the approach of military aircraft of the opposing

belligerent, must make the nearest available landing. Failure to do so exposes them to the risk of being fired upon.

ARTICLE 36. When an enemy military aircraft falls into the hands of a belligerent, the members of the crew and the passengers, if any, may be made prisoners of war.

The same rule applies to the members of the crew and the passengers, if any, of an enemy public non-military aircraft, except that in the case of public non-military aircraft devoted exclusively to the transport of passengers, the passengers will be entitled to be released unless they are in the service of the enemy, or are enemy nationals fit for military service.

If an enemy private aircraft falls into the hands of a belligerent, members of the crew who are enemy nationals or who are neutral nationals in the service of the enemy, may be made prisoners of war. Neutral members of the crew, who are not in the service of the enemy, are entitled to be released if they sign a written undertaking not to serve in any enemy aircraft while hostilities last. Passengers are entitled to be released unless they are in the service of the enemy or are enemy nationals fit for military service, in which cases they may be made prisoners of war.

Release may in any case be delayed if the military interests of the belligerent so require.

The belligerent may hold as prisoners of war any member of the crew or any passenger whose service in a flight at the close of which he has been captured has been of special and active assistance to the enemy.

The names of individuals released after giving a written undertaking in accordance with the third paragraph of this article will be notified to the opposing belligerent, who must not knowingly employ them in violation of their undertaking.

ARTICLE 37. Members of the crew of a neutral aircraft which has been detained by a belligerent shall be released unconditionally, if they are neutral nationals and not in the service of the enemy. If they are enemy nationals or in the service of the enemy, they may be made prisoners of war.

Passengers are entitled to be released unless they are in the service of the enemy or are enemy nationals fit for military service, in which cases they may be made prisoners of war.

Release may in any case be delayed if the military interests of the belligerent so require.

The belligerent may hold as prisoners of war any member of the crew or any passenger whose service in a flight at the close of which he has been captured has been of special and active assistance to the enemy.

ARTICLE 38. Where under the provisions of Articles 36 and 37 it is provided that members of the crew or passengers may be made prisoners of war, it is to be understood that, if they are not members of the armed

forces, they shall be entitled to treatment not less favorable than that accorded to prisoners of war.

CHAPTER VI

Belligerent Duties towards Neutral States and Neutral Duties towards Belligerent States

To avoid any suggestion that it is on the neutral government alone that the obligation is incumbent to secure respect for its neutrality, Article 39 provides that belligerent aircraft are under obligation to respect the rights of neutral Powers and to abstain from acts within neutral jurisdiction which it is the neutral's duty to prevent.

It will be noticed that the article is not limited to military aircraft; in fact the second phrase will apply only to belligerent aircraft of other categories, as it is they alone which may remain at liberty within neutral jurisdiction. All aircraft, however, including military, are bound to respect the rights of neutral Powers.

ARTICLE 39. Belligerent aircraft are bound to respect the rights of neutral Powers and to abstain within the jurisdiction of a neutral state from the commission of any act which it is the duty of that state to prevent.

ARTICLE 40. Belligerent military aircraft are forbidden to enter the jurisdiction of a neutral state.

ARTICLE 41. Aircraft on board vessels of war, including aircraft-carriers, shall be regarded as part of such vessel.

ARTICLE 42. A neutral government must use the means at its disposal to prevent the entry within its jurisdiction of belligerent military aircraft and to compel them to alight if they have entered such jurisdiction.

A neutral government shall use the means at its disposal to intern any belligerent military aircraft which is within its jurisdiction after having alighted for any reason whatsoever, together with its crew and the passengers, if any.

ARTICLE 43. The personnel of a disabled belligerent military aircraft rescued outside neutral waters and brought into the jurisdiction of a neutral state by a neutral military aircraft and there landed shall be interned.

ARTICLE 44. The supply in any manner, directly or indirectly, by a neutral government to a belligerent Power of aircraft, parts of aircraft, or material, supplies or munitions required for aircraft is forbidden.

ARTICLE 45. Subject to the provisions of Article 46, a neutral Power is not bound to prevent the export or transit on behalf of a belligerent of aircraft, parts of aircraft, or material, supplies or munitions for aircraft.

ARTICLE 46. A neutral government is bound to use the means at its disposal:

(1) To prevent the departure from its jurisdiction of an aircraft in a condition to make a hostile attack against a belligerent Power, or carrying

or accompanied by appliances or materials the mounting or utilization of which would enable it to make a hostile attack, if there is reason to believe that such aircraft is destined for use against a belligerent Power;

(2) To prevent the departure of an aircraft the crew of which includes any member of the combatant forces of a belligerent Power;

(3) To prevent work upon an aircraft designed to prepare it to depart in contravention of the purposes of this article.

On the departure by air of any aircraft despatched by persons or companies in neutral jurisdiction to the order of a belligerent Power, the neutral government must prescribe for such aircraft a route avoiding the neighborhood of the military operations of the opposing belligerent, and must exact whatever guarantees may be required to ensure that the aircraft follows the route prescribed.

ARTICLE 47. A neutral state is bound to take such steps as the means at its disposal permit to prevent within its jurisdiction aerial observation of the movements, operations or defenses of one belligerent, with the intention of informing the other belligerent.

This provision applies equally to a belligerent military aircraft on board a vessel of war.

ARTICLE 48. The action of a neutral Power in using force or other means at its disposal in the exercise of its rights or duties under these rules cannot be regarded as a hostile act.

CHAPTER VII

*Visit and Search, Capture and Condemnation*⁵

Both the American and British drafts when first submitted to the Commission provided for the use of aircraft in exercising against enemy commerce the belligerent rights which international law has sanctioned. This principle has not met with unanimous acceptance; the Netherlands Delegation has not felt able to accept it. The standpoint adopted by this delegation is that the custom and practice of international law is limited to a right on the part of belligerent warships to capture after certain formalities merchant vessels employed in the carriage of such commerce. No justification exists for the extension of those rights to an aircraft, which is a new engine of war entirely different in character from a warship and unable to exercise over merchant vessels or private aircraft a control similar to that exercised by a warship over merchant vessels. Consequently there is no reason to confer on a military aircraft the right to make captures as if it were a warship, and no reason to subject commerce to capture when carried in an aircraft. In developing international law the tendency should be in the direction of conferring greater, not less, immunity on private property.

For these reasons the Netherlands Delegation has not accepted the rules contained in Chapter VII and its participation in the discussion of individual

⁵ On these subjects, as developed in naval war, see §§ 165-167, 180-184, below.—Ed.

rules has been subject to the general reserves made with regard to the whole chapter.

The majority of the delegations have not felt able to reject the principle that the aircraft should be allowed to exercise the belligerent right of visit and search, followed by capture where necessary, for the repression of enemy commerce carried in an aircraft in cases where such action is permissible. This principle is embodied in Article 49 of which the text is as follows:

ARTICLE 49. Private aircraft are liable to visit and search and to capture by belligerent military aircraft.

ARTICLE 50. Belligerent military aircraft have the right to order public non-military and private aircraft to alight in or proceed for visit and search to a suitable locality reasonably accessible.

Refusal, after warning, to obey such orders to alight or to proceed to such a locality for examination exposes an aircraft to the risk of being fired upon.

ARTICLE 51. Neutral public non-military aircraft, other than those which are to be treated as private aircraft, are subject only to visit for the purpose of the verification of their papers.

ARTICLE 52. Enemy private aircraft are liable to capture in all circumstances.

ARTICLE 53. A neutral private aircraft is liable to capture if it:

- (a) resists the legitimate exercise of belligerent rights;
- (b) violates a prohibition of which it has had notice issued by a belligerent commanding officer under Article 30;
- (c) is engaged in unneutral service;
- (d) is armed in time of war when outside the jurisdiction of its own country;
- (e) has no external marks or uses false marks;
- (f) has no papers or insufficient or irregular papers;
- (g) is manifestly out of the line between the point of departure and the point of destination indicated in its papers and after such enquiries as the belligerent may deem necessary, no good cause is shown for the deviation. The aircraft, together with its crew and passengers, if any, may be detained by the belligerent, pending such enquiries.
- (h) carries, or itself constitutes, contraband of war;
- (i) is engaged in breach of a blockade duly established and effectively maintained;
- (k) has been transferred from belligerent to neutral nationality at a date and in circumstances indicating an intention of evading the consequences to which an enemy aircraft, as such, is exposed.

Provided that in each case, (except k), the ground for capture shall be an act carried out in the flight in which the neutral aircraft came into

belligerent hands, *i.e.* since it left its point of departure and before it reached its point of destination.

ARTICLE 54. The papers of a private aircraft will be regarded as insufficient or irregular if they do not establish the nationality of the aircraft and indicate the names and nationalities of the crew and passengers, the points of departure and destination of the flight, together with particulars of the cargo and the conditions under which it is transported. The logs must also be included.

ARTICLE 55. Capture of an aircraft or of goods on board an aircraft shall be made the subject of prize proceedings, in order that any neutral claim may be duly heard and determined.

ARTICLE 56. A private aircraft captured upon the ground that it has no external marks or is using false marks, or that it is armed in time of war outside the jurisdiction of its own country, is liable to condemnation.

A neutral private aircraft captured upon the ground that it has disregarded the direction of a belligerent commanding officer under Article 30 is liable to condemnation, unless it can justify its presence within the prohibited zone.

In all other cases, the prize court in adjudicating upon any case of capture of an aircraft or its cargo, or of postal correspondence on board an aircraft, shall apply the same rules as would be applied to a merchant vessel or its cargo or to postal correspondence on board a merchant vessel.

ARTICLE 57. Private aircraft which are found upon visit and search to be enemy aircraft may be destroyed if the belligerent commanding officer finds it necessary to do so, provided that all persons on board have first been placed in safety and all the papers of the aircraft have been preserved.

ARTICLE 58. Private aircraft which are found upon visit and search to be neutral aircraft liable to condemnation upon the ground of unneutral service, or upon the ground that they have no external marks or are bearing false marks, may be destroyed, if sending them in for adjudication would be impossible or would imperil the safety of the belligerent aircraft or the success of the operations in which it is engaged. Apart from the cases mentioned above, a neutral private aircraft must not be destroyed except in the gravest military emergency, which would not justify the officer in command in releasing it or sending it in for adjudication.

ARTICLE 59. Before a neutral private aircraft is destroyed, all persons on board must be placed in safety, and all the papers of the aircraft must be preserved.

A captor who had destroyed a neutral private aircraft must bring the capture before the prize court, and must first establish that he was justified in destroying it under Article 58. If he fails to do this, parties interested in the aircraft or its cargo are entitled to compensation. If the capture is

held to be invalid, though the act of destruction is held to have been justifiable, compensation must be paid to the parties interested in place of the restitution to which they would have been entitled.

ARTICLE 60. Where a neutral private aircraft is captured on the ground that it is carrying contraband, the captor may demand the surrender of any absolute contraband on board, or may proceed to the destruction of such absolute contraband, if sending in the aircraft for adjudication is impossible or would imperil the safety of the belligerent aircraft or the success of the operations in which it is engaged. After entering in the log book of the aircraft the delivery or destruction of the goods, and securing, in original or copy, the relevant papers of the aircraft, the captor must allow the neutral aircraft to continue its flight.

The provisions of the second paragraph of Article 59 will apply where absolute contraband on board a neutral private aircraft is handed over or destroyed.

CHAPTER VIII

Definitions

In some countries, the word "military" is not generally employed in a sense which includes "naval." To remove any ambiguity on this point a special article has been adopted.

ARTICLE 61. The term "military" throughout these rules is to be read as referring to all branches of the forces, *i.e.* the land forces, the naval forces and the air forces.

ARTICLE 62. Except so far as special rules are here laid down and except also so far as the provisions of Chapter VII of these rules or international conventions indicate that maritime law and procedure are applicable, aircraft personnel engaged in hostilities come under the laws of war and neutrality applicable to land troops in virtue of the custom and practice of international law and of the various declarations and conventions to which the states concerned are parties.

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QUESTIONS AND PROBLEMS

1. What is the nature of the *Hague Convention (IV) Respecting the Laws and Customs of War on Land* (§ 154)? What is the relation of the Convention to the Regulations annexed to it? How do the 1907 Convention and Regulations compare with the 1899 Convention and Regulations? Was either Convention with its Regulations binding in the World War of 1914? If the Conventions and Regulations were not regarded as binding, would this mean that the conduct of hostilities was not subject to any legal rules?

2. Would the Hague Convention (IV) be applicable in the Italo-Ethiopian conflict? In the Spanish Civil War of 1936?

3. *Combatants*. Why is it necessary to distinguish between those to whom "the laws, rights, and duties of war" apply, and those to whom they do not apply? Do they apply to the members of armies? To members of voluntary defense corps? What criteria must be applied to forces other than armies to determine whether they are entitled to the "rights of war"? What particular "right of war" do you think would be of greatest importance, for example, to a person not a member of the military forces who took up arms?

4. If States A and B are at war, and the army of State A is advancing into the territory of State B, are the following persons, if captured, entitled to treatment as prisoners of war? If not, to what treatment may they be subjected?

(a) Members of the Rotary Club of a town in State B, found taking part in the fighting.

(b) A wounded cook attached to the army of State A, apprehended without a uniform and armed with a rifle.

(c) A householder who shoots into the columns of the A army with an old shotgun as the columns first enter the streets of the town.

(d) A mob without arms which blows up a bridge over which tanks of State A's army are about to enter their town, members of the mob being subsequently captured.

(e) A troop of Boy Scouts in uniform, who conceal themselves after the occupation by the army of State A, and transmit information back to the army of State B.

5. The Army of State A occupies the Province of Winnemac of State B. How may the staff of the army of occupation legally deal with the following questions?

(a) The army requires the use of the buildings of the State University of Winnemac as barracks for its troops.

(b) X and Y, citizens of Winnemac, make a contract which X does not carry out. What courts should deal with such a question? What law should be applied?

(c) It is desired to commandeer all motor trucks in the province in order to transport troops and supplies to the front.

(d) It is desired to use funds in the treasury of the Province collected by State B and earmarked for public works, to build especially expensive roads along the army's lines of communication.

(e) It is desired to take over the assets of all banks, including those of the Provincial Bank of Winnemac, a government institution.

(f) What attitude might the staff of the army of occupation take towards a local privately owned newspaper? A radio broadcasting station? The armory of the Provincial Guard? The property of the Winnemac Trapshooters' Club? The telephone system? Dynamite used in blasting operations by a construction company? Property of the members of the Pigeon Fanciers' Association?

(g) Timber is needed to repair numerous bridges. The only available supply is that in the Winnemac State Forest, which will have to be used in its entirety to accomplish the work.

(h) Could the unemployed portion of the local population be compelled to do the work mentioned in (g)?

(i) Could the army of occupation levy an income tax with progressively higher rates in the upper brackets, if the constitutional law of State B and the Province of Winnemac prohibited such a tax? Could the army of occupation levy a sales tax to relieve destitution among the local population?

(j) Could the army of occupation confiscate poultry and livestock to feed the troops?

6. Comment on the legality of the following Proclamation, posted in Namur, Belgium, August 25, 1914.

"1. The Belgian and French soldiers must be delivered as prisoners of war before 4 o'clock in front of the prison. *Citizens who do not obey will be condemned to hard labor for life in Germany.*

A rigorous inspection of houses will commence at 4 o'clock. Every soldier found will be immediately shot.

"2. Arms, powder and dynamite must be given up at 4 o'clock. Penalty: being shot.

Citizens who know of a store of the above must inform the burgomaster, *under pain of hard labor for life.*

"3: Every street will be occupied by a German guard, who will take ten hostages from each street, whom they will keep under surveillance. If there is any rising in the street, *the ten hostages will be shot.*

"4. Doors may not be locked, and at night after eight o'clock there must be lights in three windows in every house.

"5. It is forbidden to be in the street after eight o'clock. The inhabitants of Namur must understand that there is no greater and more horrible crime than to compromise the existence of the town and the life of its citizens by criminal acts against the Germany army.

The Commander of the Town,
Von Bülow"

(English translation of the *Sixth Report of the Belgian Commission of Inquiry*, November 10, 1914. Reprinted in Stowell and Munro, *International Cases* [1916], II, 243-244.)

7. *The Conduct of Hostilities.* Comment on the legality of the following measures taken by the respective military forces during a war between States X and Y:

(a) A force of State X approaches a town of State Y, using 150 civilians of State Y as a screen. State X contends that civilians in the town are participating in the military operations.

(b) All inhabitants of another town of State Y having been evacuated before the approach of forces of State X, by order of the State Y commander a large quantity of an arsenic preparation is introduced into the water supply system.

(c) Detection apparatus leads an X commander to believe that a radio apparatus of State Y dispensing military information is housed in one of the towers of a thirteenth-century cathedral, which he thereupon orders destroyed.

(d) Instructed to bomb the switching yard of a railway, an aviator of State Y destroys a military hospital adjacent to the yard, which is plainly marked by a red cross.

(e) Metropolis, the capital of State X, contains the following institutions: a military school for staff officers, seven civilian hospitals, five large railway terminals used for ordinary traffic as well as troop movements, buildings housing government offices including ministries of War and Navy, ten large plants manufacturing munitions, a university at which all students are required to take one year's military training, and two training camps for recruits, all scattered miscellaneous through the city. A large force of State Y bombers approaches the city and is kept at a great height by the defense. The bombs cause great damage to civilian lives and property, including the death of 250 children in an elementary school and 40 worshipers in an old church. One railway terminal and the military school is completely destroyed.

(f) A commander of State X accepts the surrender of 150 soldiers of State Y. Shortly thereafter the increasing difficulty of his position leads him to believe that the guards of the prisoners are urgently needed in the fighting, and he orders the prisoners shot.

(g) A commander of State Y about to invest a town of State X causes it to be announced over the radio that if any resistance is offered the town will be razed and no prisoners will be taken.

8. What is the present legal status of the following methods of warfare?

(a) Use of liquid fire not produced by projectiles.

(b) Use of gases

(1) which kill instantly;

(2) which put victims out of action for two days, but have no other effects;

(3) which are not produced from shells.

(c) Use of bacteria producing fatal or permanent diseases.

9. Comment from the point of view of international law:

(a) On the report below, wirelessly to the *New York Times* of October 12, 1935, by Laurence Stallings.

"HARAR, Ethiopia, Oct. 11 . . . 'The Italians have gassed our troops around Gorahai and I doubt that we can continue to offer resistance to such warfare successfully.'

"As he spoke, Dedjasmach Nasebu, Governor of Harar Province, stood with tears streaming down his cheeks, surrounded by nobles clad in white chammas and equipped with red cartridge belts.

"'Five persons have died,' he said, 'and I don't know how many have

been disabled. We still have the same spirit of willingness to defend our country.' Here the Governor turned with outflung arms in a gesture of absolute horror. 'They call us savages,' he continued, 'but we cannot wage such warfare. We are not savage enough to like your civilization. They say that we are masters of cruelty, but we cannot continue on an equal footing with such tactics.' . . .

"The Italians are not soldiers,' he said. 'They cannot fight like our people. They are fantastic and disgusting. Our men at Gorahai during the gassing felt like chained prisoners. One of them told me:

"What could we do, my lord? There we stood like prisoners . . . while this thick yellow substance rolled around us, clinging to the brush, and burning our feet. I had a gas mask, so it did not get in my lungs, but the irregulars and mountain lads had to flee at the first touch of gas."

"The Governor is awaiting a report as to the composition of the gas. His own unfamiliarity with gas warfare was shown in his perfect willingness to admit his ignorance of chemicals.

"I don't know about such inhuman things as gas warfare,' he said, 'so how can I tell you what composed the gas? I come from a nation and a race of great fighters, but we are not so fantastic and cruel.'

"From the Governor's description, this observer would conclude that the Italians are using a new gas, combining the properties both of phosgene gas and mustard gas. This correspondent was sure the Ethiopian lines at Gorahai would be gassed because the terrain is unsuitable for air bombing because the bush presents no target.

"As the rumor spreads about the use of gas at Gorahai, Harar is being deserted by the civilian populace." Copyright, 1935, by North American Newspaper Alliance.

(b) On the following, printed in *Time*, July 20, 1936, p. 28.

"War in Rain. Following Italy's successful war to conquer the Ethiopian Empire in a single dry season, there began the war of pacification which may well last years. With it came the awful rains which turn much of Ethiopia yearly into a swamp.

"In Wallega Province, 150 miles from Addis Ababa, five Italian planes bearing peace envoys, a general, a priest, a major and twelve Italian airmen of lesser rank alighted and were rushed by Ethiopians from ambush. Overwhelmed by the screaming savages, every Italian had his genitals ruthlessly hacked off, died weltering in blood and agony. Had Colonel Lindbergh been thus butchered, the effect in the U. S. would scarcely exceed that produced in Italy by announcements that one of the victims was crack Fascist Ace Major Antonio Locatelli."

10. States X and Y are at war. Which of the following persons can be legally treated as spies?

(a) A civilian aviator of State X who flies over territory of State Y, is forced by accident to land, and is found to have made photographs of Y fortifications.

(b) A peasant discovered by troops of State X in occupied territory transmitting code messages to military headquarters of the Y army on a small radio transmission set in a hayloft.

(c) Forces of State X find a Y soldier, in uniform and in possession of important information, inside a hollow tree in X territory.

(d) In (c) above, would the situation be different if the "tree" were a portable device which could be carried in the knapsack?

(e) An officer of State X is known to have procured, through bribing an official in the war office of State Y, the plan of a new tank. Having rejoined the military forces of State X, the officer is captured by State Y.

11. A captain of State X, bearing a flag of truce, appears before the lines of State Y. Is the local commanding officer of the Y forces bound to receive him? May he be blindfolded? Searched? Deprived of weapons? Could the captain be shot if he were discovered to have appropriated papers in the office of the local commanding officer of the Y forces and concealed them on his person? What would be his status if he touched off a mine laid previously while the territory was occupied by the X forces?

12. What is the difference between a Capitulation and an Armistice? Between an Armistice and a Treaty of Peace? What was the character of the Armistice of November 11, 1918? Is there any other kind of Armistice? When does an armistice take effect? When does it terminate? Assuming an armistice to have been entered into by States A and B, what are State A's rights if an isolated battery of State B keeps up a barrage for two hours after the entry into force of the armistice? What would State A's rights be if, at the hour that the armistice goes into effect, the forces of State B, engaged in a victorious advance along the whole front, continued this advance and consolidated its positions? What would State B's rights be if State A, during the period of the armistice, engaged effectively in the strengthening of its positions?

13. *Prisoners of War.* Comment on the legality of the following acts, States X and Y being at war:

(a) A newspaper photographer accompanying the forces of State X falls into the hands of the forces of State Y. His only documents consist of a card of identification issued by his newspaper. He is condemned to death as a spy.

(b) Private Jones, having been taken prisoner by the X forces, is deprived of his arms, cigarettes, letters, and money.

(c) Private Jones is placed in a camp one hundred miles in the interior, surrounded by electrically charged barbed wire barricades, and guarded by observation towers containing machine guns. During the day he is compelled to work on the local roads along with a company of other prisoners whose labor has been sold to a local contractor.

(d) Captain Smith, also a prisoner in the same camp, is ordered to superintend the labors of the crew in (c) as foreman. He refuses.

(e) Lieutenant Doe is shot while attempting to escape.

(f) Corporal Roe escapes but is apprehended by military police ten miles from the camp. He is ordered shot.

(g) Major Robinson escapes and rejoins the army of X, but is recaptured. Returned to the same prison camp, he is ordered to do sanitary duty as punishment for his previous escape.

(h) Captain Kidd gives his parole to State Y and returns to State X. At the solicitation of the government of State X he rejoins the army and is recaptured by State Y. State Y has him tried by the courts, which condemn him to ten years imprisonment at hard labor.

(i) Prisoners in State Y are alleged by State X to be receiving insufficient food. State Y replies that while the ration is slightly lower than that prevailing

for corresponding ranks in the Y army, this is due to the general shortage of food created by the illegal blockade of State Y by State X.

(j) State X asks State Y for a general exchange of prisoners, rank for rank and person for person, which request State Y refuses.

14. States A and B are at war, and other States are neutral. All States are assumed to be bound by the *Geneva (Red Cross) Convention* of 1929 (§ 158). What may be legally done in the following instances?

(a) Young men and women, nationals of State C, form in State C a Red Cross unit. They desire to go to the front.

(b) A Red Cross ambulance attached to the forces of State A is captured by State B forces. It contains, besides the personnel regularly attached to it and three wounded men of the forces of State A (who are equipped with hand grenades), a wounded soldier in the uniform of State B who is known to be a spy of State A.

(c) In a general advance by the State B armies, a convoy of twenty-five Red Cross trucks, attached to the forces of State A and loaded with wounded from both armies, falls into the hands of the B army. The staff of the B army regards the use of the trucks for military transport purposes as indispensable.

(d) A tank of State A desires to commandeer the gasoline and oil of a group of Red Cross trucks attached to the armies of State B, during a lull in a battle. The trucks contain wounded soldiers.

(e) State A forces capture a town in which there is a Red Cross hospital filled with State B wounded.

(f) Miss Smith, a national of State A, is a member of a Red Cross unit of State A. Her unit is captured by State B, and Miss Smith's unit is assigned to a hospital caring for wounded of both States. Miss Smith helps a wounded soldier of State A to escape.

15. What is the nature of the *General Report of the Commission of Jurists* printed as § 159? Does it embody accepted rules of international law? What is its importance? Explain. With what subjects does it deal?

16. States A and B are at war. Other States are neutral. In the following situations, what are the rights of the different States (1) under existing international law; (2) if all States had adopted the rules recommended by the Commission of Jurists at The Hague (§ 159)?

(a) The navy of State B erects a radio station on a little-frequented island belonging to State C.

(b) A naval officer of State A leaves his ship in a port of State C and leaves a code message with a commercial radio company for transmission to State A.

(c) State B maintains powerful stations whose sole purpose it is to set up interference with reception of messages sent by radio stations of State A.

(d) An aircraft of State C transmits radio messages to units of the State A fleet on the high seas. This is detected by a squadron of the State B fleet.

17. States A and B are at war. Other States are neutral. In the following situations, what are the rights of the different States (1) under existing international law; (2) assuming all States had adopted the rules recommended by the Commission of Jurists at The Hague (§ 159)?

(a) An aircraft manufactured in State C, to the order of a private firm in State A, sets out to fly to State A. On a part of its journey, which is over the

high seas, it encounters a State A aircraft carrier. The aircraft descends on signal and is fitted with military equipment on board the aircraft carrier.

(b) State C forbids all belligerent aircraft to fly over its territory or territorial seas, on pain of being shot down.

(c) An aircraft of State C in flight over the high seas relays a code message which subsequently turns out to have contained military information. The message is received by a cruiser of State A.

(d) A State A dirigible filled with hydrogen is destroyed by an incendiary bullet which causes the hydrogen to explode.

(e) A State B military aircraft encounters a State C private aircraft over the high seas which is suspected of carrying two staff officers of the army of State A, and of previously running a blockade.

(f) After a State B military aircraft had compelled a State C private aircraft to alight on the high seas, investigation on board reveals the presence of absolute and conditional contraband. The State B aircraft destroys the State C aircraft.

18. In State X, a Fascist revolt breaks out against a Socialist Government. In such a war, do any rules of warfare have application? Discuss. Then comment on the legality of the following acts:

(a) The Government issues arms to all able-bodied men who apply for them. The rebels, refusing to take such men prisoners, kill them instead on the ground that they are not entitled to treatment as prisoners of war.

(b) Rebel men, women, and children occupy an old fort which is an historic monument, in a city under control of the Government. When the rebels refuse to surrender, Government forces mine and destroy the building.

(c) Rebel airmen bomb the capital city. They make no attempt to destroy only buildings and works of military importance, but bomb indiscriminately, on the ground that the Government has issued arms to all able-bodied men who apply.

(d) The Government, claiming the air raid in (c) to have been illegal, has twenty hostages, persons of importance, executed as a reprisal.

(e) The rebel army, advancing through hostile territory, takes as hostages five leading citizens of each town and announces that if rebel soldiers are molested the citizens will be shot.

(f) Government forces, abandoning a town, burn it to the ground.

(g) Rebel airplanes spray Government troops with machinegun fire from an altitude of ninety feet.

(h) The Government announces that three ships of the navy which have joined the revolt will be treated as pirates.

XVII

Conduct of Hostilities at Sea

§ 160. NAVAL BOMBARDMENT OF COAST TOWNS

Convention (IX) Concerning Bombardment by Naval Forces in Time of War

SIGNED AT THE HAGUE, OCTOBER 18, 1907¹

English text from J. B. Scott, *Hague Conventions and Declarations of 1899 and 1907* (1915), pp. 157-159.

[Names of signatories, preamble, and names of plenipotentiaries omitted.]

CHAPTER I. *The Bombardment of Undefended Ports, Towns, Villages, Dwellings, or Buildings*

ARTICLE 1. The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden.

A place cannot be bombarded solely because automatic submarine contact mines are anchored off the harbor.

ART. 2. Military works, military or naval establishments, depots of arms or war *matériel*, workshops or plant which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbor, are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery, after a summons followed by a reasonable

¹ This Convention has been ratified or adhered to by the following States: Austria (deposited ratification October 25, 1937), Austria-Hungary, Belgium, Bolivia, Brazil, China, Cuba, Denmark, El Salvador, Ethiopia (adhered August 5, 1935), Finland (adhered 1922), France (with reservation), Germany (with reservation), Great Britain (with reservation), Guatemala, Haiti, Japan (with reservation), Liberia, Luxemburg, Mexico, Netherlands, Nicaragua, Norway, Panama, Poland (adhered May 31, 1935), Portugal, Roumania, Russia, Siam, Spain, Sweden, Switzerland, United States of America. (As of August, 1939.) The reservations indicated were to the second sentence of Article 1 in each case.

Servia did not ratify or adhere to this Convention, and under its Article 8 it was consequently not binding on any of the belligerents in the World War of 1914.—Ed.

time of waiting, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed.

He incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.

If for military reasons immediate action is necessary, and no delay can be allowed the enemy, it is understood that the prohibition to bombard the undefended town holds good, as in the case given in paragraph 1, and that the commander shall take all due measures in order that the town may suffer as little harm as possible.

ART. 3. After due notice has been given, the bombardment of undefended ports, towns, villages, dwellings, or buildings may be commenced, if the local authorities, after a formal summons has been made to them, decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force before the place in question.

These requisitions shall be in proportion to the resources of the place. They shall only be demanded in the name of the commander of the said naval force, and they shall, as far as possible, be paid for in cash; if not, they shall be evidenced by receipts.

ART. 4. Undefended ports, towns, villages, dwellings, or buildings may not be bombarded on account of failure to pay money contributions.²

CHAPTER II. *General Provisions*

ART. 5. In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes.

It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of large, stiff rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower portion white.

ART. 6. If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities.

² German cruisers bombarded the three English coast towns of Scarborough, Hartlepool, and Whitby, without any warning, in the early morning of December 16, 1914, killing a considerable number of noncombatants. The cruisers had to avoid the defending British ships. It was contended by the British Government that this bombardment was contrary to the Convention, but the German Government claimed that Hartlepool was fortified, and that Whitby and Scarborough were defended either by regular troops, coast guns, and/or volunteers. See Garner, *International Law and the World War*, I, 425. The question of what constitutes an "undefended" town allows such divergences of interpretation that a State does not need to claim that it is not bound by the Convention.—Ed.

ART. 7. A town or place, even when taken by storm, may not be pillaged.

CHAPTER III. *Final Provisions*

ART. 8. The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention.

[Articles 9-13, dealing with ratifications, adhesion and denunciation, and the signatures, are omitted.]

§ 161. SUBMARINE MINES

Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines

SIGNED AT THE HAGUE, OCTOBER 18, 1907¹

English text from J. B. Scott, *Hague Conventions and Declarations of 1899 and 1907* (1915), pp. 151-152.

[Names of signatories, preamble, and names of plenipotentiaries omitted.]

ARTICLE 1. It is forbidden—

1. To lay unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them;

2. To lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings;

3. To use torpedoes which do not become harmless when they have missed their mark.

ART. 2. It is forbidden to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping.

ART. 3. When anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping.

¹ This Convention has been ratified or adhered to by the following States: Austria (deposited ratification October 25, 1937), Austria-Hungary, Belgium, Brazil, China, Denmark, El Salvador, Ethiopia (adhered August 5, 1935), Finland (adhered June 9, 1922), France (with reservation), Germany (with reservation), Great Britain, Guatemala, Haiti, Japan, Liberia, Luxemburg, Mexico, Netherlands, Nicaragua, Norway, Panama, Roumania, Siam (with reservation), Switzerland, and the United States of America. (As of August, 1939.) France and Germany both made reservation of Article 2, while Great Britain reserved the right to contest the legality of acts not prohibited by the Convention.

Under its Article 11, the Convention is to remain in force for seven years after the sixtieth day after the deposit of the first ratification, and thereafter if the Convention is not denounced. There have been no denunciations, and Austria, Finland and Ethiopia adhered after the conclusion of the World War of 1914. During this war Servia and Russia not being parties, the Convention under its Article 7 was not binding on any of the belligerents.—Ed.

The belligerents undertake to do their utmost to render these mines harmless within a limited time, and, should they cease to be under surveillance, to notify the danger zones as soon as military exigencies permit, by a notice addressed to ship owners, which must also be communicated to the Governments through the diplomatic channel.

ART. 4. Neutral Powers which lay automatic contact mines off their coasts must observe the same rules and take the same precautions as are imposed on belligerents.

The neutral Power must inform ship owners, by a notice issued in advance, where automatic contact mines have been laid. This notice must be communicated at once to the Governments through the diplomatic channel.

ART. 5. At the close of the war, the contracting Powers undertake to do their utmost to remove the mines which they have laid, each Power removing its own mines.

As regards anchored automatic contact mines laid by one of the belligerents off the coast of the other, their position must be notified to the other party by the Power which laid them, and each Power must proceed with the least possible delay to remove the mines in its own waters.

ART. 6. The contracting Powers which do not at present own perfected mines of the pattern contemplated in the present Convention, and which, consequently, could not at present carry out the rules laid down in Articles 1 and 3, undertake to convert the *matériel* of their mines as soon as possible, so as to bring it into conformity with the foregoing requirements.

ART. 7. The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention.

[Articles 8-10 omitted.]

ART. 11. The present Convention shall remain in force for seven years, dating from the sixtieth day after the date of the first deposit of ratifications.

Unless denounced, it shall continue in force after the expiration of this period.

[Paragraphs 3-13 of Article 11, dealing with ratifications, adhesions, and the signatures, are omitted.]

§ 162. SUBMARINE MINES (*Continued*)

NOTE BY THE EDITOR

The textual inadequacy of this Convention to resolve the problem with which it dealt was recognized at the time of signature and was clearly demonstrated in the World War of 1914. The Convention does not prohibit the placing of all mines in seas traversed by neutral shipping, but only

the placing of certain types of mines. The laying of mine fields (of anchored mines) is permitted, so long as the mines become harmless when they have broken from their moorings. It is obvious that the prohibition of mine-laying off the coasts and ports of the enemy "with the sole object of intercepting commercial shipping" can usually be avoided by the claim that the mines were laid to attack the vessels of the hostile fleet.

Early in the World War mines were laid by Germany in the North Sea and elsewhere which were said by the British not to have become harmless after a certain number of hours, but whether they were originally un-anchored mines appears not to have been stated. In October and November, 1914, the British Government announced that the German policy had made it necessary to establish mine fields in certain areas, the area covered in the latter notice comprising the whole of the North Sea. Sailing directions were given to vessels which would protect them from British mines. These areas were subsequently extended and changed.

The United States called the attention of Great Britain to the Hague Convention, August 13, 1914, but Great Britain replied that it did not contend that Germany had violated the Hague Convention. Germany did not regard the Convention as binding because Russia had not ratified. Although Norway, Sweden, and Denmark protested the later British measures the United States declined to do so on November 10, 1914.¹

As to the more important question, whether the general principle of "freedom of the seas" authorized neutral shipping to navigate the high seas subject to interruption by belligerents *only* on grounds of blockade running, carriage of contraband, and unneutral service (as established by existing customary and conventional international law), this is impossible to prove. It was precisely because of the experience with submarine mines in the Russo-Japanese War of 1904 that the rules of Hague Convention (VIII) were drawn up. There certainly was no custom with respect to mines, and it must therefore be concluded that the entirely equivocal and unsatisfactory rules of Convention (VIII) represented the maximum of agreement possible on the rules applicable in 1907, when most of the difficulties appear to have been foreseen. As to "freedom of the seas," the whole history of the principle is one of the gradual working out of specific customary and conventional applications which give it what meaning it now possesses. There was no such meaning worked out in either 1914 or in 1938 with respect to submarine mines, beyond the provisions of Hague Convention (VIII).²

¹ C. Savage, *Policy of the United States towards Maritime Commerce in War* (1936), II, 50-51.

² For another view, see Garner, Vol. I, Chap. XIV; Walker's Pitt Cobbett, 154-158; Lauterpacht's Oppenheim, II, 372-374.

§ 163. CONVERSION OF MERCHANT SHIPS

Convention (VII) Relating to the Conversion of Merchant Ships into War-Ships

SIGNED AT THE HAGUE, OCTOBER 18, 1907¹English text from J. B. Scott, *Hague Conventions and Declarations of 1899 and 1907* (1915), pp. 146-147.

[Names of signatories, preamble, and names of plenipotentiaries omitted.]

ARTICLE 1. A merchant ship converted into a war-ship can not have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control, and responsibility of the Power whose flag it flies.

ART. 2. Merchant ships converted into war-ships must bear the external marks which distinguish the war-ships of their nationality.

ART. 3. The commander must be in the service of the State and duly commissioned by the competent authorities. His name must figure on the list of the officers of the fighting fleet.

ART. 4. The crew must be subject to military discipline.

ART. 5. Every merchant ship converted into a war-ship must observe in its operations the laws and customs of war.

ART. 6. A belligerent who converts a merchant ship into a war-ship must, as soon as possible, announce such conversion in the list of war-ships.

ART. 7. The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention.

[Articles 8-12, dealing with ratification, denunciation, and so on, and signatures, are omitted.]

§ 164. CONVERSION OF MERCHANT SHIPS (*Continued*):
PRIVATEERING—"DEFENSIVE ARMAMENT"

NOTE BY THE EDITOR

Privateering represented an early form of the problem dealt with by Hague Convention (VII). Privateers were "vessels owned and manned by private persons, but empowered by a commission from the State, called

¹ The following States have ratified or adhered to this Convention: Austria (deposited ratification October 25, 1937), Austria-Hungary, Belgium, Brazil, China, Denmark, El Salvador, Ethiopia (adhered August 5, 1935), Finland (adhered June 9, 1922), France, Germany, Great Britain, Guatemala, Haiti, Japan, Liberia, Luxemburg, Mexico, Netherlands, Nicaragua, Norway, Panama, Poland (adhered May 31, 1935), Portugal, Roumania, Russia, Siam, Spain,

a Letter of Marque, to carry on hostilities at sea. The law declared the commission to be revocable for bad conduct on the part of the privateer; and other means were taken to secure that she did not violate the laws of war, such as the lodgment of security and the enforcement of liability to search by public vessels whose flag she carried."¹ Privateering was abolished by the terms of the Declaration of Paris, 1856, and by subsequent custom.²

For controversies on conversion during the Franco-Prussian War of 1870 and the Russo-Japanese War of 1904, see Walker's Pitt Cobbett, II, 174-182, and Winfield's Lawrence (7th ed.), 508-510. It is now a common practice of States in peacetime to take measures assuring that the ships of their merchant marine shall be made suitable for wartime use and subject to use by the government in war as part of an auxiliary navy.

Controversy did not center on Hague Convention (VII) during 1914-1918. The Convention did not deal with certain essential questions: (1) Might merchantmen be converted into vessels of war on the high seas? (2) Were "defensively armed" merchantmen of the belligerents to be regarded as merchant ships or as warships? At the Conference of 1907 the first of these questions had led to a pronounced difference of opinion, which, continuing through the London Naval Conference of 1909, prevented agreement when war broke out in 1914. Austria-Hungary, France, Germany and Russia held that merchantmen could be converted on the high seas, while Great Britain and Belgium held that conversion could only take place on the territory of the belligerents. It seems clear that conversion within neutral jurisdiction would constitute a failure of the neutral to fulfill its obligations.³

The question whether a merchant ship "defensively armed" became a warship acquired new significance with the advent of the submarine. The rule enforced during the earlier part of the nineteenth century was that a belligerent merchant ship might be armed without becoming a warship, and that such a merchant ship might resist attacks begun by an enemy; but it might not initiate such an attack without rendering itself liable to treatment as a warship.⁴ During the nineteenth and twentieth centuries, however, three important developments took place: (1) piracy was suppressed; (2) privateering was abolished; and (3) the development of armaments made it practically impossible for an armed merchant ship to cope with warships. It could thus be contended that the reasons for per-

Sweden, Switzerland, Turkey (with reservation). The United States of America did not sign, ratify, or adhere to this Convention. (All information as of August, 1939.)

Servia not having ratified this Convention, according to its Article 7 it was not binding on any of the belligerents at any time during the World War of 1914.

¹ Winfield's Lawrence, *International Law*, 7th Ed. (1923), 500.

² See § 180 below.

³ See Art. 8, Hague Convention (XIII) below, page 873.

⁴ See, for example, discussion in *The Nereide* (1815), 9 Cranch (U. S.) 388.

mitting "defensive armament" on merchant vessels had disappeared. Thus when the United States permitted "defensively armed" British merchantmen the use of American ports, Germany regarded such conduct as unneutral, and even Great Britain at first had her doubts.⁵ While most neutral governments followed the practice of the United States, the Netherlands forbade entrance to its ports to all armed belligerent vessels.

The advent of the submarine meant the reappearance of a sea weapon against which "defensive armament" on merchant vessels was again potent. If a belligerent submarine once rose to the surface, it was at the mercy of light armament on board a "defensively armed" merchant ship. The submarine's only assurance of safety in such circumstances was that the commanding officer of the merchantman would not regard mere appearance of the submarine as an attack. This situation was full of dangerous potentialities, most of which were realized in the World War. On the one hand, submarine commanders were tempted to attack without coming to the surface, and without going through the formalities of visit and search required by the customary law which had grown up from the practice of surface ships. On the other hand, "defensively armed" ships were tempted to fire at or ram enemy submarines on sight, and in fact were instructed to do so. The situation was further confused by the legally permitted practice of using false neutral flags, so that a submarine which did not come to the surface to visit and search, thus exposing itself to the possible fire of "defensive armament" on a belligerent merchant vessel, could not tell whether a vessel carrying a neutral flag was truly a neutral.⁶

§ 165. THE RIGHT OF VISIT AND SEARCH

Belligerent vessels of war have, in time of war, the right to visit and search vessels found on the high seas (even neutral vessels) in order to see if such vessels are carrying contraband, running a blockade, or are guilty of unneutral service. The document printed below is an excerpt which states the rules governing the exercise of the right of visit and search. The *Instructions* had not been changed in November, 1938.

Instructions for the Navy of the United States, Governing Maritime Warfare, June, 1917, pp. 21-23.

SECTION VI

Visit and Search

WHERE AND WHEN EXERCISED

42. The belligerent right of visit and search, subject to exemptions mentioned in Section VII, may be exercised outside of neutral jurisdiction

⁵ Garner, *International Law and the World War*, I, 386-393, and authorities there cited.

⁶ See §§ 168-170. For the controversies relating to the arming of merchant ships, see

upon private vessels after the beginning of war in order to determine their nationality, the port of destination and departure, the character of their cargo, the nature of their employment, or other facts which bear on their relation to the war.

METHOD OF EXERCISE

43. The right should be exercised with tact and consideration, and in strict conformity with treaty provisions, where they exist.

44. Subject to any special treaty provisions the following procedure is directed: Before summoning a vessel to lie to, a ship of war must hoist her own national flag. The summons shall be made by firing a blank charge (*coup de semonce*), by other international signal, or by both. The summoned vessel, if a neutral, is bound to stop and lie to, and she should also display her colors; if an enemy vessel, she is not so bound, and may legally even resist by force, but she thereby assumes all risks of resulting damage.

45. If the summoned vessel resists or takes to flight she may be pursued and brought to, by forcible measures, if necessary.

46. When the summoned vessel has brought to, the ship of war shall send a boat with an officer to conduct the visit and search. If practicable, a second officer should accompany the officer charged with the examination. There may be arms in the boat, but the boat's crew shall not have any on their persons. The officer (or officers), wearing side arms, may be accompanied on board by not more than two unarmed men of the boat's crew.

47. The boarding officer shall first examine the ship's papers in order to ascertain her nationality, ports of departure and destination, character of cargo, and other facts deemed essential. If the papers furnish conclusive evidence of the innocent character of vessel, cargo, and voyage, the vessel shall be released; if they furnish probable cause for capture she shall be seized and sent in for adjudication.

48. If the papers do not furnish conclusive evidence of the innocent character of the vessel, the cargo, and voyage, or probable cause for capture, the boarding officer shall continue the examination by questioning the personnel or by searching the vessel or by examining her cargo. If such further examination furnishes satisfactory evidence of innocence, the vessel shall be released; otherwise she shall be seized and sent in for adjudication.

49. The boarding officer must record the facts concerning the visit and search upon the log-book of the vessel visited, including the date when and the position where the visit occurred. This entry in the log must be made whether the vessel is held or not. (See Forms 5, 6, and 7 [not reprinted].)

PAPERS

50. The papers which will generally be found on board a private vessel are (see Appendix II [not reprinted]):

1. The certificate of registry or nationality.
2. A certified bill of sale, or certificate thereof duly authenticated, in the absence of certificate of registry or nationality, or in the case of a vessel which has recently been transferred from enemy to neutral ownership.
3. The crew list.
4. The passenger list.
5. The log book.
6. The bill of health.
7. The clearance papers.
8. The charter party, if chartered.
9. Invoices or manifests of cargo.
10. Bills of lading.

The evidence furnished by the papers against a vessel is conclusive. Regularity of papers and evidence of the innocence of cargo or destination furnished by them are not necessarily conclusive, and if doubt exists a search of the ship or cargo should be made to establish the facts. If a vessel has deviated far from her direct course, this, if not satisfactorily explained, is a suspicious circumstance warranting search, however favorable the character of the papers.

SECTION VII

Limitations on Visit and Search

CONVOY

51. Neutral vessels under convoy of vessels of war of their own nationality are exempt from search. The commander of the convoy gives orally or in writing, at the request of the commander of a belligerent ship of war, all information regarding the vessels and their cargoes which could be obtained by visit and search.

52. If the commander of the United States vessel has reason to suspect that the commander of the convoy has been deceived regarding the innocent character of any of the vessels (and their cargoes or voyages) under his convoy, the former officer shall impart his suspicions to the latter. In such a case it is to be expected that the commander of the convoy will undertake an examination to establish the facts. The commander of the convoy alone can conduct this investigation, the officers of the United States visiting vessel can take no part therein.

53. The commander of the convoy may be expected to report the result of his investigation to the commander of the United States vessel. Should

that result confirm the latter's suspicions, the former may further be expected to withdraw his protection from the suspected vessel; whereupon she shall be made a prize by the commander of the United States vessel.

54. Any vessel under convoy of a vessel of war of an enemy is liable to capture.

SEARCH OF NEUTRAL MAIL VESSELS

55. The inviolability of certain postal correspondence does not exempt a neutral mail ship from the laws and customs of maritime war as to neutral merchant ships in general.

§ 166. LIABILITY TO CAPTURE

While the following excerpts from the United States Naval *Instructions* duplicate at certain points materials exhibited more fully in the following chapter, they are reprinted because they illustrate, from the point of view of a belligerent vessel of war, exactly what vessels may be captured. The *Instructions* had not been changed in November, 1938.

Instructions for the Navy of the United States, Governing Maritime Warfare, June, 1917, pp. 26-28.

SECTION IX

Liability to Capture

ENEMY VESSELS

62. Enemy vessels are liable to capture outside of neutral jurisdiction.

63. The following when innocently employed are exempt from capture:

- (a) Cartel ships designated for and engaged in exchange of prisoners.
- (b) Vessels charged with religious, scientific, or philanthropic missions.
- (c) Properly designated hospital ships.
- (d) Vessels exempt by treaty or special proclamation.
- (e) Small coast (not deep-sea) fishing vessels and small boats employed in local trade.

65. [*sic*] The fishing vessels and small boats referred to in article 63 (e) may be subjected to special regulation imposed by the United States naval commander operating in the vicinity. They are liable to capture if such regulations be disobeyed or if they engage in any undertaking prejudicial to United States military operations by land or sea.

NEUTRAL VESSELS

64. A neutral private vessel is in general liable to capture if she—

- (a) Attempts to avoid visit and search by flight, but this must be clearly evident; or resists with force.

(b) Presents irregular or fraudulent papers, or lacks necessary papers, or destroys, defaces, or conceals papers. (See for detailed provisions as to papers, paragraph 51; also Appendix II (III) [not reprinted].)

(c) Carries contraband, except when permitted by treaty to surrender ("deliver up," "deliver out") the contraband to the captors. (See Forms 8 to 10 [not reprinted].)

(d) Has broken or has attempted to break a blockade. (See Sec. III [not reprinted].)

(e) Has engaged in unneutral service. (See Sec. IV [not reprinted].)

(f) Is under enemy convoy; or under neutral convoy to avoid rightful capture.

65. [*sic*] If a neutral vessel, met at sea with contraband destined to the enemy, is unaware of the existence of a state of war or of a declaration of contraband which applies to her cargo, the vessel shall, as a rule, be sent in for adjudication, and though the cargo may not be liable to condemnation it may be detained or requisitioned. (See Form No. 7 [not reprinted].)

66. A vessel is deemed to be aware of the existence of a state of war or of a declaration of contraband if she left a neutral port after sufficient time had elapsed for the publication there of the notification of the opening of hostilities to the neutral power to which the port belongs, or for the publication there of the contraband lists proclaimed by the United States, respectively. A vessel is also deemed to be aware of the existence of a state of war if she left an enemy port after the war began.

FREE SHIPS, FREE GOODS

67. "The neutral flag covers enemy goods with the exception of contraband of war." (Declaration of Paris, 1856, art. 2.)

68. "Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag." (Declaration of Paris, 1856, art. 3.)

CARRIAGE OF CONTRABAND

69. Contraband, in paragraph 24 (a), (b), (c), and (d), is liable to capture if its actual destination is the territory belonging to or occupied by the enemy or the armed forces of the enemy. It is immaterial whether the carriage of the contraband to such actual destination be direct in the original vessel or involve trans-shipment or transport overland. (See paragraph 67 above and references.)

70. Contraband, in paragraph 24 (e), is liable to capture if it is actually destined for the use of the enemy government or its armed forces. It is

immaterial whether the carriage of contraband be direct in the original vessel, or involve trans-shipment or transport overland.

PRESUMPTION AS TO DESTINATION

71. A destination for the use of the enemy government or its armed forces referred to in paragraph 70 is presumed to exist if the contraband is consigned—

- (a) To enemy authorities.
- (b) To a port of equipment or supply of the armed forces of the enemy or other place serving as a base for such armed forces.
- (c) To a contractor or agent in enemy territory who, by common knowledge, supplies articles of the kind in question to the enemy authorities.

72. A destination to territory belonging to or occupied by the enemy or to the armed forces of the enemy, referred to in paragraph 69, is presumed to exist if the contraband is consigned "to order," "to order or assigns," or with an unnamed consignee, but in any case going to territory belonging to or occupied by the enemy, or to neutral territory in the vicinity thereof.

UNITED STATES VESSELS IN ENEMY TRADE

73. Any vessel of the United States found engaged in trade of any kind with the enemy without a license so to do from the President of the United States or his duly authorized agent shall be captured and sent in for adjudication. Any vessel of the United States that is found trading under a license issued by the enemy shall be captured and sent in for adjudication.

§ 167. RESTRICTIONS ON NAVAL CAPTURES

Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War

SIGNED AT THE HAGUE, OCTOBER 18, 1907¹

English text from J. B. Scott, *Hague Conventions and Declarations of 1899 and 1907* (1915), pp. 182-184.

[Names of signatories, preamble, and names of plenipotentiaries omitted.]

¹ This Convention has been ratified or adhered to by the following States: Austria (deposited ratification October 25, 1937), Austria-Hungary, Belgium, Brazil, China, Denmark, El Salvador, Ethiopia (adhered August 5, 1935), Finland (adhered June 9, 1922), France, Germany, Great Britain, Guatemala, Haiti, Japan, Liberia, Luxemburg, Mexico, Netherlands, Nicaragua, Norway, Panama, Poland (adhered May 31, 1935), Portugal, Roumania, Siam, Spain, Sweden, Switzerland, and the United States of America. (As of August, 1939.)

Servia did not ratify or adhere to this Convention, and as a consequence of its Article 9 it was not binding on any of the belligerents in the wars 1914-1918.—ED.

CHAPTER I. *Postal Correspondence*²

ARTICLE 1. The postal correspondence of neutrals or belligerents, whatever its official or private character may be, found on the high seas on board a neutral or enemy ship, is inviolable. If the ship is detained, the correspondence is forwarded by the captor with the least possible delay.

The provisions of the preceding paragraph do not apply, in case of violation of blockade, to correspondence destined for or proceeding from a blockaded port.

ART. 2. The inviolability of postal correspondence does not exempt a neutral mail ship from the laws and customs of maritime war as to neutral merchant ships in general. The ship, however, may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible.

CHAPTER II. *The Exemption from Capture of Certain Vessels*³

ART. 3. Vessels used exclusively for fishing along the coast or small boats employed in local trade are exempt from capture, as well as their appliances, rigging, tackle, and cargo.

They cease to be exempt as soon as they take any part whatever in hostilities.

The contracting Powers agree not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance.

ART. 4. Vessels charged with religious, scientific, or philanthropic missions are likewise exempt from capture.

CHAPTER III. *Regulations Regarding the Crews of Enemy Merchant Ships Captured by a Belligerent*

ART. 5. When an enemy merchant ship is captured by a belligerent, such of its crew as are nationals of a neutral State are not made prisoners of war.

The same rule applies in the case of the captain and officers likewise

² During the World War of 1914, Great Britain opened and examined mail bags found on neutral vessels compelled by British regulations to enter British waters and ports. While neutrals, including the United States, protested, this action was defended on the grounds that Germany used the mails to scatter propaganda, forward contraband, send securities abroad, and organize *sabotage* in manufacturing establishments in neutral countries. The immunity granted in the Convention extends to postal *correspondence*, and apparently not to packages; and it does not, in practice, prevent censorship. For a convenient résumé of the controversies between the United States and Great Britain on these points, see 10 *A.J.I.L.* (Supp., 1916), 404-426. Garner, *International Law and the World War*, II, Chap. XXXIV, also describes these controversies. See also *U. S. For. Rel. Supplements for the war years*; and C. Savage, *Policy of the United States toward Maritime Commerce in War* (1936), II, 26-29.—Ed.

³ See *The Paquete Habana*, § 6, above.—Ed.

nationals of a neutral State, if they promise formally in writing not to serve on an enemy ship while the war lasts.

ART. 6. The captain, officers, and members of the crew, when nationals of the enemy State, are not made prisoners of war, on condition that they make a formal promise in writing, not to undertake, while hostilities last, any service connected with the operations of the war.⁴

ART. 7. The names of the persons retaining their liberty under the conditions laid down in Article 5, paragraph 2, and in Article 6, are notified by the belligerent captor to the other belligerent. The latter is forbidden knowingly to employ the said persons.

ART. 8. The provisions of the three preceding articles do not apply to ships taking part in the hostilities.

CHAPTER IV. *Final Provisions*

ART. 9. The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention. . . .

[Articles 10-14, dealing with ratification, adherence, and so on, and the signatures, are omitted.]

§ 168. SUBMARINE WARFARE: THE *LUSITANIA* CORRESPONDENCE

The controversy between the United States and Germany over submarine warfare occurred while the United States was a neutral, and the United States was supporting what it considered to be the rights of citizens of neutral States to travel on neutral or belligerent merchant ships in the war zones. Nevertheless, the substance of the controversy related, in cases in which American citizens were traveling on board belligerent merchant vessels, to the rights of one belligerent as against the other. The fundamental issue was as to the circumstances in which the submarines of one belligerent might, under international law, destroy the merchant vessels of another belligerent. Basically, therefore, whatever rights of safe travel existed for American citizens on belligerent ships in the war zones depended upon, and were incidental to, whatever rights of destruction existed at the time as between belligerents. It is for this reason that the position of the United States in such cases as that of the *Lusitania*, appears to be a position supporting one belligerent as against the other; and it is for this reason that these materials on submarine warfare are printed in the section relating to the Conduct of Hostilities at Sea, rather than in that relating to Neutrality.

On May 7, 1915, the steamship *Lusitania*, a large passenger vessel of British registry, was torpedoed and sunk without warning off the coast of Ireland. Of the 1,917 persons on board, 1,153 perished, and 114 of these were American citizens. Although the United States did not recognize the existence of a state of war

⁴ During the World War of 1914, such persons were usually interned by the belligerents.—Ed.

with Germany until almost two years afterwards, the sinking of the *Lusitania* stirred the country, especially the northeastern portion, to its depths, and was unquestionably the most important single incident preparing the people for war with Germany. In the public discussion of the sinking in the United States, the fact that American citizens were lost came to obscure the equally important fact that these citizens were traveling on a vessel of belligerent registry, which was probably carrying munitions to Great Britain. See T. A. Bailey, "The Sinking of the *Lusitania*," 41 *American Historical Review* (1935), 54-73. This is to be explained in part, however, by attacks on American vessels occurring previously. Nevertheless the whole matter is rendered uncertain by the contentions of Germany that British ships were under orders from the Admiralty to fly false neutral flags (thus making it impossible for submarine commanders to distinguish between belligerent and neutral vessels), and to ram submarines which should come to the surface.

It is impossible in a brief selection of documents to cover all important points in the momentous controversy over submarine warfare. The two notes selected merely give the broad outlines of the positions taken by the United States and Germany. Students who desire to apprehend the problem in its nuances should consult *Supplements to U. S. Foreign Relations* for 1915, 1916, and 1917; C. Savage, *Policy of the United States toward Maritime Commerce in War* (1936), Vol. II, Chap. V, and E. M. Borchard and W. P. Lage, *Neutrality for the United States* (1937), especially pp. 140 ff. Certain further facts may be added here. President Wilson refused to accept the proposals of the German Government at the end of its note of July 8, but while this correspondence was still going on the British liner *Arabic* was sunk with the loss of two American lives. There followed a temporary abandonment of the German submarine warfare; on September 1 assurances were given the United States that henceforth liners would not be sunk by submarines without warning and without saving the lives of noncombatants, provided they would not attempt to escape or to offer resistance. In March, 1916, however, the *Sussex* was sunk in the English Channel, with loss of American lives. The assurances of the German Government were renewed, on the threat of the United States to sever diplomatic relations; but on January 31, 1917, the German Government announced that all ships, neutral and belligerent, found after February 1 in a new war zone around Great Britain, would be sunk. The result was the severance by the United States of diplomatic relations with Germany and the ultimate Congressional declaration, by Joint Resolution of April 6, of the existence of a state of war.

a. The Note of June 9, 1915, to Germany on the *Lusitania* and Other Cases

Papers Relating to the Foreign Relations of the United States, 1915
(Supplement), pp. 436-438.

The Secretary of State ad interim to the Ambassador in Germany (Gerard)

Washington, June 9, 1915

1803. You are instructed to deliver textually the following note to the Minister of Foreign Affairs:

In compliance with your excellency's request I did not fail to transmit to my Government immediately upon their receipt your note of May 28 in

reply to my note of May 15 [13], and your supplementary note of June 1, setting forth the conclusions so far as reached by the Imperial German Government concerning the attacks on the American steamers *Cushing* and *Gulflight*. I am now instructed by my Government to communicate the following in reply:

The Government of the United States notes with gratification the full recognition by the Imperial German Government, in discussing the cases of the *Cushing* and the *Gulflight*, of the principle of the freedom of all parts of the open sea to neutral ships and the frank willingness of the Imperial German Government to acknowledge and meet its liability where the fact of attack upon neutral ships "which have not been guilty of any hostile act" by German aircraft or vessels of war is satisfactorily established; and the Government of the United States will in due course lay before the Imperial German Government, as it requests, full information concerning the attack on the steamer *Cushing*.

With regard to the sinking of the steamer *Falaba*, by which an American citizen lost his life, the Government of the United States is surprised to find the Imperial German Government contending that an effort on the part of a merchantman to escape capture and secure assistance alters the obligation of the officer seeking to make the capture in respect of the safety of the lives of those on board the merchantman, although the vessel had ceased her attempt to escape when torpedoed. These are not new circumstances. They have been in the minds of statesmen and of international jurists throughout the development of naval warfare, and the Government of the United States does not understand that they have ever been held to alter the principles of humanity upon which it has insisted. Nothing but actual forcible resistance or continued efforts to escape by flight when ordered to stop for the purpose of visit on the part of the merchantman has ever been held to forfeit the lives of her passengers or crew. The Government of the United States, however, does not understand that the Imperial German Government is seeking in this case to relieve itself of liability, but only intends to set forth the circumstances which led the commander of the submarine to allow himself to be hurried into the course which he took.

Your excellency's note, in discussing the loss of American lives resulting from the sinking of the steamship *Lusitania*, adverts at some length to certain information which the Imperial German Government has received with regard to the character and outfit of that vessel, and your excellency expresses the fear that this information may not have been brought to the attention of the Government of the United States. It is stated in the note that the *Lusitania* was undoubtedly equipped with masked guns, supplied with trained gunners and special ammunition, transporting troops from

Canada, carrying a cargo not permitted under the laws of the United States to a vessel also carrying passengers, and serving, in virtual effect, as an auxiliary to the naval forces of Great Britain. Fortunately, these are matters concerning which the Government of the United States is in a position to give the Imperial German Government official information. Of the facts alleged in your excellency's note, if true, the Government of the United States would have been bound to take official cognizance in performing its recognized duty as a neutral power and in enforcing its national laws. It was its duty to see to it that the *Lusitania* was not armed for offensive action, that she was not serving as a transport, that she did not carry a cargo prohibited by the statutes of the United States, and that, if in fact she was a naval vessel of Great Britain, she should not receive clearance as a merchantman; and it performed that duty and enforced its statutes with scrupulous vigilance through its regularly constituted officials. It is able, therefore, to assure the Imperial German Government that it has been misinformed. If the Imperial German Government should deem itself to be in possession of convincing evidence that the officials of the Government of the United States did not perform these duties with thoroughness, the Government of the United States sincerely hopes that it will submit that evidence for consideration.

Whatever may be the contentions of the Imperial German Government regarding the carriage of contraband of war on board the *Lusitania* or regarding the explosion of that material by the torpedo, it need only be said that in the view of this Government these contentions are irrelevant to the question of the legality of the methods used by the German naval authorities in sinking the vessel.

But the sinking of passenger ships involves principles of humanity which throw into the background any special circumstances of detail that may be thought to affect the cases, principles which lift it, as the Imperial German Government will no doubt be quick to recognize and acknowledge, out of the class of ordinary subjects of diplomatic discussion or of international controversy. Whatever be the other facts regarding the *Lusitania*, the principal fact is that a great steamer, primarily and chiefly a conveyance for passengers, and carrying more than a thousand souls who had no part or lot in the conduct of the war, was torpedoed and sunk without so much as a challenge or a warning, and that men, women, and children were sent to their death in circumstances unparalleled in modern warfare. The fact that more than one hundred American citizens were among those who perished made it the duty of the Government of the United States to speak of these things and once more, with solemn emphasis, to call the attention of the Imperial German Government to the grave responsibility which the Government of the United States conceives

that it has incurred in this tragic occurrence, and to the indisputable principle upon which that responsibility rests. The Government of the United States is contending for something much greater than mere rights of property or privileges of commerce. It is contending for nothing less high and sacred than the rights of humanity, which every Government honors itself in respecting and which no Government is justified in resigning on behalf of those under its care and authority. Only her actual resistance to capture or refusal to stop when ordered to do so for the purpose of visit could have afforded the commander of the submarine any justification for so much as putting the lives of those on board the ship in jeopardy. This principle the Government of the United States understands the explicit instructions issued on August 3, 1914, by the Imperial German Admiralty to its commanders at sea to have recognized and embodied, as do the naval codes of all other nations, and upon it every traveler and seaman had a right to depend. It is upon this principle of humanity as well as upon the law founded upon this principle that the United States must stand.

The Government of the United States is happy to observe that your excellency's note closes with the intimation that the Imperial German Government is willing, now as before, to accept the good offices of the United States in an attempt to come to an understanding with the Government of Great Britain by which the character and conditions of the war upon the sea may be changed. The Government of the United States would consider it a privilege thus to serve its friends and the world. It stands ready at any time to convey to either Government any intimation or suggestion the other may be willing to have it convey and cordially invites the Imperial German Government to make use of its services in this way at its convenience. The whole world is concerned in anything that may bring about even a partial accommodation of interests or in any way mitigate the terrors of the present distressing conflict.

In the meantime, whatever arrangement may happily be made between the parties to the war, and whatever may in the opinion of the Imperial German Government have been the provocation or the circumstantial justification for the past acts of its commanders at sea, the Government of the United States confidently looks to see the justice and humanity of the Government of Germany vindicated in all cases where Americans have been wronged or their rights as neutrals invaded.

The Government of the United States therefore very earnestly and very solemnly renews the representations of its note transmitted to the Imperial German Government on the 15th of May, and relies in these representations upon the principles of humanity, the universally recognized understandings of international law, and the ancient friendship of the German nation.

The Government of the United States can not admit that the proclamation of a war zone from which neutral ships have been warned to keep away may be made to operate as in any degree an abbreviation of the rights either of American shipmasters or of American citizens bound on lawful errands as passengers on merchant ships of belligerent nationality. It does not understand the Imperial German Government to question those rights. It understands it, also, to accept as established beyond question the principle that the lives of noncombatants can not lawfully or rightfully be put in jeopardy by the capture or destruction of an unresisting merchantman, and to recognize the obligation to take sufficient precaution to ascertain whether a suspected merchantman is in fact of belligerent nationality or is in fact carrying contraband of war under a neutral flag. The Government of the United States therefore deems it reasonable to expect that the Imperial German Government will adopt the measures necessary to put these principles into practice in respect of the safeguarding of American lives and American ships, and asks for assurances that this will be done.

LANSING

b. The German Note of July 8, 1915, on the Lusitania

Papers Relating to the Foreign Relations of the United States,
1915 (Supplement), pp. 463-466.

The Ambassador in Germany (Gerard) to the Secretary of State

[Telegram]

Berlin, July 8, 1915

[Received July 10, in sections.]

FOREIGN OFFICE

Berlin, July 8, 1915

The undersigned has the honor to make the following reply to the note of his excellency, Mr. James W. Gerard, Ambassador of the United States of America, dated the 10th [9th] ultimo, Foreign Office No. 3814, on the subject of the impairment of American interests by the German submarine war:

The Imperial Government has learned with satisfaction from the note how earnestly the Government of the United States is concerned in seeing the principles of humanity realized in the present war. Also, this appeal meets with full sympathy in Germany, and the Imperial Government is quite willing to permit its statements and decisions in the case under consideration to be governed by the principles of humanity just as it has done always.

The Imperial Government welcomed it with gratitude when the American Government in its note of May 15 [13], 1915, itself recalled that Ger-

many had always permitted itself to be governed by the principles of progress and humanity in dealing with the law of maritime war. Since the time when Frederick the Great negotiated with John Adams, Benjamin Franklin, and Thomas Jefferson the treaty of friendship and commerce of September 10, 1785, between Prussia and the Republic of the West, German and American statesmen have in fact always stood together in the struggle for the freedom of the seas and for the protection of peaceable trade. In the international proceedings which have since been conducted for the regulation of the right of maritime war Germany and America have jointly advocated progressive principles, especially the abolishment of the right of capture at sea and the protection of the interests of neutrals. Even at the beginning of the present war the German Government immediately declared its willingness, in response to the proposal of the American Government, to ratify the Declaration of London and thereby to subject itself, in the use of its naval forces, to all the restrictions provided therein in favor of neutrals. Germany has likewise been always tenacious of the principle that war should be conducted against the armed and organized forces of the enemy country, but that the civilian population of the enemy must be spared as far as possible from the measures of war. The Imperial Government cherishes the definite hope that some way will be found when peace is concluded, or perhaps earlier, to regulate the law of maritime war in a manner guaranteeing the freedom of the seas, and will welcome it with gratitude and satisfaction if it can work hand in hand with the American Government on that occasion.

If in the present war the principles which should be the ideal of the future have been traversed more and more the longer its duration, the German Government has no guilt therein.

It is known to the American Government how Germany's adversaries, by completely paralyzing peaceable traffic between Germany and the neutral countries, have aimed from the very beginning, and with increasing lack of consideration, at the destruction, not so much of the armed forces, as the life of the German nation, repudiating in so doing all the rules of international law and disregarding all the rights of neutrals. On November 3, 1914, England declared the North Sea to be a war area, and by planting poorly anchored mines and the stoppage and capture of vessels made passage extremely dangerous and difficult for neutral shipping, so that it is actually blockading neutral coasts and ports, contrary to all international law. Long before the beginning of the submarine war England practically completely intercepted legitimate neutral navigation to Germany also. Thus Germany was driven to submarine war on trade. On November 16, 1914, the English Prime Minister declared in the House of Commons that it was one of England's principal tasks to prevent food for the German population

from reaching Germany by way of neutral ports. Since March 1 of this year England has been taking from neutral ships, without further formality, all merchandise proceeding to Germany, as well as all merchandise coming from Germany, even when neutral property. Just as was the case with the Boers, the German people is now to be given the choice of perishing from starvation, with its women and children, or of relinquishing its independence.

While our enemies thus loudly and openly have proclaimed war without mercy until our utter destruction, we are conducting war in self-defense for our national existence and for the sake of peace of assured permanency. We have been obliged to adopt submarine warfare to meet the declared intentions of our enemies and the method of warfare adopted by them in contravention of international law.

With all its efforts in principle to protect neutral life and property from damage as much as possible, the German Government recognized unreservedly in its memorandum of February 4 that the interests of neutrals might suffer from submarine warfare. However, the American Government will also understand and appreciate that in the fight for existence which has been forced upon Germany by its adversaries and announced by them, it is the sacred duty of the Imperial Government to do all within its power to protect and to save the lives of German subjects. If the Imperial Government were derelict in these, its duties, it would be guilty before God and history of the violation of those principles of the highest humanity which are the foundation of every national existence.

The case of the *Lusitania* shows with horrible clearness to what jeopardizing of human lives the manner of conducting war employed by our adversaries leads. In most direct contradiction of international law, all distinctions between merchantmen and war vessels have been obliterated by the order to British merchantmen to arm themselves and to ram submarines, and the promise of rewards therefor; and neutrals who use merchantmen as travelers have thereby been exposed in an increasing degree to all the dangers of war. If the commander of the German submarine which destroyed the *Lusitania* had caused the crew and travelers to put out in boats before firing the torpedo, this would have meant the sure destruction of his own vessel. After the experiences in the sinking of much smaller and less seaworthy vessels, it was to be expected that a mighty ship like the *Lusitania* would remain above water long enough, even after the torpedoing, to permit the passengers to enter the ship's boats. Circumstances of a very peculiar kind, especially the presence on board of large quantities of highly explosive materials, defeated this expectation. In addition, it may be pointed out that if the *Lusitania* had been spared, thousands of cases of ammunition would have been sent to Germany's enemies and

thereby thousands of German mothers and children robbed of their supporters.

In the spirit of friendship with which the German nation has been imbued toward the Union and its inhabitants since the earliest days of its existence, the Imperial Government will always be ready to do all it can, during the present war also, to prevent the jeopardizing of the lives of American citizens.

The Imperial Government therefore repeats the assurances that American ships will not be hindered in the prosecution of legitimate shipping, and the lives of American citizens on neutral vessels shall not be placed in jeopardy.

In order to exclude any unforeseen dangers to American passenger steamers, made possible in view of the conduct of maritime war on the part of Germany's adversaries, the German submarines will be instructed to permit the free and safe passage of such passenger steamers when made recognizable by special markings and notified a reasonable time in advance. The Imperial Government, however, confidently hopes that the American Government will assume the guarantee that these vessels have no contraband on board. The details of the arrangements for the unhampered passage of these vessels would have to be agreed upon by the naval authorities of both sides.

In order to furnish adequate facilities for travel across the Atlantic Ocean for American citizens, the German Government submits for consideration [a proposal] to increase the number of available steamers by installing in the passenger service a reasonable number of neutral steamers, the exact number to be agreed upon, under the American flag under the same conditions as the American steamers above mentioned.

The Imperial Government believes that it can assume that in this manner adequate facilities for travel across the Atlantic Ocean can be afforded American citizens. There would therefore appear to be no compelling necessity for American citizens to travel to Europe in time of war on ships carrying an enemy flag. In particular the Imperial Government is unable to admit that American citizens can protect an enemy ship through the mere fact of their presence on board. Germany merely followed England's example when it declared part of the high seas an area of war. Consequently accidents suffered by neutrals on enemy ships in this area of war can not well be judged differently from accidents to which neutrals are at all times exposed at the seat of war on land when they betake themselves into dangerous localities in spite of previous warning.

If, however, it should not be possible for the American Government to acquire an adequate number of neutral passenger steamers, the Imperial Government is prepared to interpose no objections to the placing under

the American flag by the American Government of four enemy passenger steamers for the passenger traffic between America and England. The assurances of "free and safe" passage for American passenger steamers would then be extended to apply under the identical pre-conditions to these formerly hostile passenger ships.

The President of the United States has declared his readiness, in a way deserving of thanks, to communicate and suggest proposals to the Government of Great Britain with particular reference to the alteration of maritime war. The Imperial Government will always be glad to make use of the good offices of the President, and hopes that his efforts in the present case, as well as in the direction of the lofty ideal of the freedom of the seas, will lead to an understanding.

The undersigned requests the Ambassador to bring the above to the knowledge of the American Government, and avails himself [etc.].

VON JAGOW

GERARD

§ 169. SUBMARINE WARFARE (*Continued*): PROPOSED MODUS VIVENDI, JANUARY 18, 1916

The proposal here reprinted was not acceptable to the Governments to which it was addressed and hence never came into effect. It is presented here as a statement of rules which might make possible the use of submarines in warfare against commerce without endangering unduly the lives of noncombatants. See E. M. Borchard and W. P. Lage, *Neutrality for the United States* (1936), especially pp. 102 ff.

Foreign Relations of the United States, 1916 (Supplement), pp. 146-148.

The American Proposal of January 18, 1916, of a Modus Vivendi for the Observance of Rules of International Law and Principles of Humanity by Submarines and the Discontinuance of Armament of Merchant Ships

File No. 763.72/2357a

*The Secretary of State to the British Ambassador (Spring Rice)*¹

Washington, January 18, 1916

MY DEAR MR. AMBASSADOR: It is a matter of the deepest interest to my Government to bring to an end, if possible, the dangers to life which attend the use of submarines as at present employed in destroying enemy commerce

¹ The same, *mutatis mutandis*, on the same date, to the French and Russian Ambassadors and the Belgian Minister, on January 19 to the Italian Ambassador, and on January 24 to the Japanese Ambassador.

on the high seas, since on any merchant vessel of belligerent nationality there may be citizens of the United States who have taken passage or are members of the crew, in the exercise of their recognized rights as neutrals. I assume that your excellency's Government are equally solicitous to protect their nationals from the exceptional hazards which are presented by their passage on a merchant vessel through those portions of the high seas in which undersea craft of their enemy are operating.

While I am fully alive to the appalling loss of life among non-combatants, regardless of age or sex, which has resulted from the present method of destroying merchant vessels without removing the persons on board to places of safety, and while I view that practice as contrary to those humane principles which should control belligerents in the conduct of their naval operations, I do not feel that a belligerent should be deprived of the proper use of submarines in the interruption of enemy commerce since those instruments of war have proved their effectiveness in this particular branch of warfare on the high seas.

In order to bring submarine warfare within the general rules of international law and the principles of humanity without destroying its efficiency in the destruction of commerce, I believe that a formula may be found which, though it may require slight modifications of the practice generally followed by nations prior to the employment of submarines, will appeal to the sense of justice and fairness of all the belligerents in the present war.

Your excellency will understand that in seeking a formula or rule of this nature I approach it of necessity from the point of view of a neutral, but I believe that it will be equally efficacious in preserving the lives of all non-combatants on merchant vessels of belligerent nationality.

My comments on this subject are predicated on the following propositions:

1. A non-combatant has a right to traverse the high seas in a merchant vessel entitled to fly a belligerent flag and to rely upon the observance of the rules of international law and principles of humanity if the vessel is approached by a naval vessel of another belligerent.

2. A merchant vessel of enemy nationality should not be attacked without being ordered to stop.

3. An enemy merchant vessel, when ordered to do so by a belligerent submarine, should immediately stop.

4. Such vessel should not be attacked after being ordered to stop unless it attempts to flee or to resist, and in case it ceases to flee or resist, the attack should discontinue.

5. In the event that it is impossible to place a prize crew on board of an enemy merchant vessel or convoy it into port, the vessel may be sunk, provided the crew and passengers have been removed to a place of safety.

In complying with the foregoing propositions which, in my opinion, embody the principal rules, the strict observance of which will insure the life of a non-combatant on a merchant vessel which is intercepted by a submarine, I am not unmindful of the obstacles which would be met by undersea craft as commerce destroyers.

Prior to the year 1915 belligerent operations against enemy commerce on the high seas had been conducted with cruisers carrying heavy armaments. Under these conditions international law appeared to permit a merchant vessel to carry an armament for defensive purposes without losing its character as a private commercial vessel. This right seems to have been predicated on the superior defensive strength of ships of war, and the limitation of armament to have been dependent on the fact that it could not be used effectively in offense against enemy naval vessels, while it could defend the merchantman against the generally inferior armament of piratical ships and privateers.

The use of the submarine, however, has changed these relations. Comparison of the defensive strength of a cruiser and a submarine shows that the latter, relying for protection on its power to submerge, is almost defenseless in point of construction. Even a merchant ship carrying a small caliber gun would be able to use it effectively for offense against a submarine. Moreover, pirates and sea rovers have been swept from the main trade channels of the seas, and privateering has been abolished. Consequently, the placing of guns on merchantmen at the present day of submarine warfare can be explained only on the ground of a purpose to render merchantmen superior in force to submarines and to prevent warning and visit and search by them. Any armament, therefore, on a merchant vessel would seem to have the character of an offensive armament.

If a submarine is required to stop and search a merchant vessel on the high seas and, in case it is found that she is of enemy character and that conditions necessitate her destruction, to remove to a place of safety all persons on board, it would not seem just or reasonable that the submarine should be compelled, while complying with these requirements, to expose itself to almost certain destruction by the guns on board the merchant vessel.

It would, therefore, appear to be a reasonable and reciprocally just arrangement if it could be agreed by the opposing belligerents that submarines should be caused to adhere strictly to the rules of international law in the matter of stopping and searching merchant vessels, determining their belligerent nationality, and removing the crews and passengers to places of safety before sinking the vessels as prizes of war, and that merchant vessels of belligerent nationality should be prohibited and prevented from carrying any armament whatsoever.

In presenting this formula as a basis for conditional declarations by the belligerent governments, I do so in the full conviction that your Government will consider primarily the humane purpose of saving the lives of innocent people rather than the insistence upon a doubtful legal right which may be denied on account of new conditions.

I would be pleased if you would be good enough to bring this suggestion to the attention of your Government and inform me of their views upon the subject and whether they would be willing to make such a declaration conditioned upon their enemies' making a similar declaration.

A communication similar to this one has been addressed to the Ambassadors of France, Russia, and Italy and the Minister of Belgium at this capital.

I should add that my Government is impressed with the reasonableness of the argument that a merchant vessel carrying an armament of any sort, in view of the character of submarine warfare and the defensive weakness of undersea craft, should be held to be an auxiliary cruiser and so treated by a neutral as well as by a belligerent government, and is seriously considering instructing its officials accordingly.

I am [etc.] ^{2a}

ROBERT LANSING

§ 170. SUBMARINE WARFARE (*Concluded*): THE RULES OF 1936

Procès-Verbal

Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22, 1930 ¹

LONDON, NOVEMBER 6, 1936

British Treaty Series, No. 29 (1936), as reprinted in 31
American Journal of International Law (*Supp.*, 1937), 137-138.

WHEREAS the Treaty for the Limitation and Reduction of Naval Armaments signed in London on the 22nd April, 1930,² has not been ratified by all the signatories;

^{2a} Cf. § 189 below, at p. 955, and Secs. 6 and 11 of the "Neutrality Act" of 1939, below, § 191, p. 986.—Ed.

¹ The following States are bound by the *procès-verbal*: Afghanistan, Australia, Belgium, Brazil, Bulgaria, Canada, Costa Rica, Denmark, Egypt, El Salvador, Estonia, Finland, France, Germany, Great Britain, Greece, Guatemala, Haiti, Holy See, Hungary, India, Iraq, Irish Free State, Italy, Japan, Latvia, Lithuania, Mexico, Netherlands, Nepal, New Zealand, Norway, Panama, Peru, Poland, Saudi Arabia, Siam, Sweden, Switzerland, Turkey, Union of South Africa, United States of America, Union of Soviet Socialist Republics, Yugoslavia. (As of August, 1939.)—Ed.

² *British Treaty Series*, No. 1 (1931), Cmd. 3758.

And whereas the said treaty will cease to be in force after the 31st December, 1936, with the exception of Part IV thereof, which sets forth rules as to the action of submarines with regard to merchant ships as being established rules of international law, and remains in force without limit of time;

And whereas the last paragraph of Article 22 in the said Part IV states that the high contracting parties invite all other Powers to express their assent to the said rules;

And whereas the Governments of the French Republic and the Kingdom of Italy have confirmed their acceptance of the said rules resulting from the signature of the said treaty;

And whereas all the signatories of the said treaty desire that as great a number of Powers as possible should accept the rules contained in the said Part IV as established rules of international law;

The undersigned, representatives of their respective governments, bearing in mind the said Article 22 of the treaty, hereby request the Government of the United Kingdom of Great Britain and Northern Ireland forthwith to communicate the said rules, as annexed hereto, to the governments of all the Powers which are not signatories of the said treaty, with an invitation to accede thereto definitely and without limit of time.

RULES

(1) In their action with regard to merchant ships, submarines must conform to the rules of international law to which surface vessels are subject.

(2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

Signed in London, the 6th day of November, nineteen hundred and thirty-six.³

[Names of signatories are omitted.]

³ More stringent rules were declared established international law in a treaty signed at Washington, February 6, 1922, by the United States, France, the British Empire, Italy, and Japan, but failed to become operative when France failed to ratify. These rules required submarines to exercise the right of visit and search as to merchant vessels, and to place passengers and crew in a place of safety before destruction of the vessel. If submarines could not capture under these rules they were required to permit the vessel to proceed unmolested.

§ 171. HOSPITAL SHIPS

Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention

SIGNED AT THE HAGUE, OCTOBER 18, 1907¹

English text from J. B. Scott, *Hague Conventions and Declarations of 1899 and 1907* (1915), pp. 164-174.

[Names of signatories, preamble, and names of plenipotentiaries omitted.]

The signatory States agreed that they would punish violations of these rules "as if for an act of piracy," and to prohibit as among themselves the use of submarines "as commerce destroyers."—Text in *U. S. Treaties and Conventions*, III, 3116.

The Havana Convention on Maritime Neutrality, signed February 20, 1928, contains the following rules:

"FREEDOM OF COMMERCE IN TIME OF WAR. ART. 1. The following rules shall govern commerce in time of war:

"1. Warships of the belligerents have the right to stop and visit on the high seas and in territorial waters that are not neutral any merchant ship with the object of ascertaining its character and nationality and of verifying whether it conveys cargo prohibited by international law or has committed any violation of blockade. If the merchant ship does not heed the signal to stop, it may be pursued by the warship and stopped by force; outside of such a case the ship cannot be attached unless, after being hailed, it fails to observe the instructions given it.

"The ship shall not be rendered incapable of navigation before the crew and passengers have been placed in safety.

"2. Belligerent submarines are subject to the foregoing rules. If the submarine cannot capture the ship while observing these rules, it shall not have the right to continue to attack or to destroy the ship.

"ART. 2. Both the detention of the vessel and its crew for violation of neutrality shall be made in accordance with the procedure which best suits the State effecting it and at the expense of the transgressing ship. Said State, except in the case of grave fault on its part, is not responsible for damages which the vessel may suffer."—ED.

¹ This Convention has been ratified or adhered to by the following States: Austria (deposited ratification October 25, 1937), Austria-Hungary, Belgium, Bolivia, Brazil, China (with reservation), Cuba, Denmark, El Salvador, Ethiopia (adhered August 5, 1935), Finland (adhered June 9, 1922), France, Germany, Guatemala, Haiti, Italy (1936), Japan, Latvia, Luxemburg, Mexico, Netherlands, Nicaragua, Norway, Panama, Poland (adhered May 31, 1935), Portugal, Roumania, Russia, Siam, Spain, Sweden, Switzerland, and the United States of America. (As of August, 1939.)

Preliminary consideration is being given a revision of this Convention. See issues of *Revue Internationale de la Croix-Rouge*.

Under its Article 25, this Convention when ratified, replaced, as between the contracting States, Convention (III) of the Hague Conference of 1899 for the adaptation to maritime warfare of the principles of the Geneva Convention, and the Convention of 1899 remained in force as between the States which "signed," ratified, or adhered to it, but did not ratify or adhere to the 1907 Convention. These States were the following: Argentine, Bulgaria, Chile, Colombia, Dominican Republic, Ecuador, Great Britain, Greece, Honduras, Italy, Korea, Montenegro, Paraguay, Peru, Persia, Serbia, Turkey, Venezuela, and Uruguay.

The only belligerents in the World War of 1914 which appear not to have ratified or adhered to either Convention, were San Marino, whose war against Austria-Hungary began June 3, 1915, and Costa Rica, whose war against Germany began May 24, 1918. As a result of the terms of Article 11 of the 1899 Convention, and of Article 18 of the 1907 Convention, the Conventions were not binding on any belligerent from the date of San Marino's entry into the war.

ARTICLE 1. Military hospital ships, that is to say, ships constructed or assigned by States specially and solely with a view to assisting the wounded, sick, and shipwrecked, the names of which have been communicated to the belligerent Powers at the commencement or during the course of hostilities, and in any case before they are employed, shall be respected, and can not be captured while hostilities last.

These ships, moreover, are not on the same footing as war-ships as regards their stay in a neutral port.

ART. 2. Hospital ships, equipped wholly or in part at the expense of private individuals or officially recognized relief societies, shall be likewise respected and exempt from capture, if the belligerent Power to whom they belong has given them an official commission and has notified their names to the hostile Power at the commencement of or during hostilities, and in any case before they are employed.

These ships must be provided with a certificate from the competent authorities declaring that the vessels have been under their control while fitting out and on final departure.

ART. 3. Hospital ships, equipped wholly or in part at the expense of private individuals or officially recognized societies of neutral countries shall be respected and exempt from capture, on condition that they are placed under the control of one of the belligerents, with the previous consent of their own Government and with the authorization of the belligerent himself, and that the latter has notified their names to his adversary at the commencement of or during hostilities, and in any case, before they are employed.

ART. 4. The ships mentioned in Articles 1, 2, and 3 shall afford relief and assistance to the wounded, sick, and shipwrecked of the belligerents without distinction of nationality.

The Governments undertake not to use these ships for any military purpose.

These vessels must in no wise hamper the movements of the combatants.

During and after an engagement they will act at their own risk and peril.

The belligerents shall have the right to control and search them; they can refuse to help them, order them off, make them take a certain course, and put a commissioner on board; they can even detain them, if important circumstances require it.

As far as possible, the belligerents shall enter in the log of the hospital ships the orders which they give them.

ART. 5. Military hospital ships shall be distinguished by being painted white outside with a horizontal band of green about a meter and a half in breadth.

The ships mentioned in Articles 2 and 3 shall be distinguished by being

painted white outside with a horizontal band of red about a meter and a half in breadth.

The boats of the ships above mentioned, as also small craft which may be used for hospital work, shall be distinguished by similar painting.

All hospital ships shall make themselves known by hoisting, with their national flag, the white flag with a red cross provided by the Geneva Convention, and further, if they belong to a neutral State, by flying at the main-mast the national flag of the belligerent under whose control they are placed.

Hospital ships which, in the terms of Article 4, are detained by the enemy must haul down the national flag of the belligerent to whom they belong.

The ships and boats above mentioned which wish to ensure by night the freedom from interference to which they are entitled, must, subject to the assent of the belligerent they are accompanying, take the necessary measures to render their special painting sufficiently plain.

ART. 6. The distinguishing signs referred to in Article 5 can only be used, whether in time of peace or war, for protecting or indicating the ships therein mentioned.

ART. 7. In the case of a fight on board a war-ship, the sick wards shall be respected and spared as far as possible.

The said sick wards and the *matériel* belonging to them remain subject to the laws of war; they can not, however, be used for any purpose other than that for which they were originally intended, so long as they are required for the sick and wounded.

The commander, however, into whose power they have fallen may apply them to other purposes, if the military situation requires it, after seeing that the sick and wounded on board are properly provided for.

ART. 8. Hospital ships and sick wards of vessels are no longer entitled to protection if they are employed for the purpose of injuring the enemy.

The fact of the staff of the said ships and sick wards being armed for maintaining order and for defending the sick and wounded, and the presence of wireless telegraphy apparatus on board, is not a sufficient reason for withdrawing protection.

ART. 9. Belligerents may appeal to the charity of the commanders of neutral merchant ships, yachts, or boats to take on board and tend the sick and wounded.

Vessels responding to this appeal, and also vessels which have of their own accord rescued sick, wounded, or shipwrecked men, shall enjoy special protection and certain immunities. In no case can they be captured for having such persons on board, but, apart from special undertakings that have been made to them, they remain liable to capture for any violations of neutrality they may have committed.

ART. 10. The religious, medical, and hospital staff of any captured ship is inviolable, and its members can not be made prisoners of war. On leaving the ship they take away with them the objects and surgical instruments which are their own private property.

This staff shall continue to discharge its duties while necessary, and can afterwards leave, when the commander-in-chief considers it possible.

The belligerents must guarantee to the said staff, when it has fallen into their hands, the same allowances and pay which are given to the staff of corresponding rank in their own navy.

ART. 11. Sailors and soldiers on board, when sick or wounded, as well as other persons officially attached to fleets or armies, whatever their nationality, shall be respected and tended by the captors.

ART. 12. Any war-ship belonging to a belligerent may demand that sick, wounded, or shipwrecked men on board military hospital ships, hospital ships belonging to relief societies or to private individuals, merchant ships, yachts, or boats, whatever the nationality of these vessels, should be handed over.

ART. 13. If sick, wounded, or shipwrecked persons are taken on board a neutral war-ship, every possible precaution must be taken that they do not again take part in the operations of the war.

ART. 14. The shipwrecked, wounded, or sick of one of the belligerents who fall into the power of the other belligerent are prisoners of war. The captor must decide, according to circumstances, whether to keep them, send them to a port of his own country, to a neutral port, or even to an enemy port. In this last case, prisoners thus repatriated cannot serve again while the war lasts.

ART. 15. The shipwrecked, sick, or wounded, who are landed at a neutral port with the consent of the local authorities, must, unless an arrangement is made to the contrary between the neutral State and the belligerent States, be guarded by the neutral State so as to prevent them again taking part in the operations of the war.

The expenses of tending them in hospital and interning them shall be borne by the State to which the shipwrecked, sick, or wounded persons belong.

ART. 16. After every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them, as well as the dead, against pillage and ill-treatment.

They shall see that the burial, whether by land or sea, or cremation of the dead shall be preceded by a careful examination of the corpse.

ART. 17. Each belligerent shall send, as early as possible, to the authorities of their country, navy, or army the military marks or documents of identity

found on the dead and the description of the sick and wounded picked up by him.

The belligerents shall keep each other informed as to internments and transfers as well as to the admissions into hospitals and deaths which have occurred among the sick and wounded in their hands. They shall collect all the objects of personal use, valuables, letters, etc., which are found in the captured ships, or which have been left by the sick or wounded who died in hospital, in order to have them forwarded to the persons concerned by the authorities of their own country.

ART. 18. The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention.

ART. 19. The commanders-in-chief of the belligerent fleets must see that the above articles are properly carried out; they will have also to see to cases not covered thereby, in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention.

ART. 20. The signatory Powers shall take the necessary measures for bringing the provisions of the present Convention to the knowledge of their naval forces, and especially of the members entitled thereunder to immunity, and for making them known to the public.

ART. 21. The signatory Powers likewise undertake to enact or to propose to their legislatures, if their criminal laws are inadequate, the measures necessary for checking in time of war individual acts of pillage and ill-treatment in respect to the sick and wounded in the fleet, as well as for punishing, as an unjustifiable adoption of naval or military marks, the unauthorized use of the distinctive marks mentioned in Article 5 by vessels not protected by the present Convention.

They will communicate to each other, through the Netherland Government, the enactments for preventing such acts at the latest within five years of the ratification of the present Convention.

ART. 22. In the case of operations of war between the land and sea forces of belligerents, the provisions of the present Convention do not apply except between the forces actually on board ship.

[Articles 23-28, dealing with ratifications, adhesions, etc., and the signatures, are omitted.]

§ 172. HOSPITAL SHIPS (*Continued*)

NOTE BY THE EDITOR

During the World War of 1914, there were numerous sinkings of hospital ships, most of them by German submarines, though the Austro-Hun-

garian hospital ship *Elektra* appears to have been sunk by a British or French submarine. The following facts may be said to emerge from the controversies between belligerents: (1) Neither side claimed that the principle of Hague Convention (X) of 1907 was not binding, at least as to the inviolability of hospital ships not used for any belligerent purpose. (2) Each side claimed, when alleged to have violated the principle, either that it was a case of mistaken identity, or that the ship was being used for a belligerent purpose, such as signaling, scouting, or the carriage of troops or supplies. The German Government in 1917 charged that the British Government made a practice of transporting troops and munitions across the Channel under the Red Cross flag, and announced that hospital ships in certain areas would be attacked. This was, of course, denied, and the British Government pointed out that the German submarines did not exercise the right of visit and search to determine the character of the vessels sunk. Without entering into the scholarly discussion which exists on the subject, one can only say that if a belligerent does cover military operations with the Red Cross flag, even occasionally, the submarines of his enemy can never exercise the right of visit and search with safety thereafter. It is a case in which the slightest deviation from good faith by either belligerent must in the nature of the matter be disastrous; but in which, on the other hand, the full observance of obligations pays immeasurable returns.¹

Article 228 of the Treaty of Versailles required Germany to try before military tribunals persons accused of having committed acts in violation of the laws and customs of war. In the *Case of Dithmar and Boldt*, the German *Reichsgericht* in 1921 upheld the convictions of two lieutenants of a German submarine which had destroyed the hospital ship *Llandoverly Castle*, commissioned by the British Government to carry to Canada Canadian sick and wounded. The vessel was marked and its name communicated to enemy powers under the provisions of Hague Convention (X). The submarine commander, Patzig (not tried: "present whereabouts unknown") had given the order to fire the torpedo after recognizing the *Llandoverly Castle* as a hospital ship, on the basis of information, "including some from official sources, the accuracy of which cannot be verified," that Allied hospital ships carried combatant troops and munitions. After the sinking, Patzig sought unsuccessfully to verify, from witnesses taken from lifeboats, that the *Llandoverly Castle* carried combatant airmen and munitions. The submarine then fired on the lifeboats, Dithmar and Boldt participating on Patzig's order. Then Patzig falsified the logbook and the chart. The Court held that "the firing on the boats was an offence against the law of nations" for which

¹ For accounts of the World War controversies, see Garner, *International Law and the World War*, I, 505-519; Walker's Pitt Cobbett, II, 158-165; and Lauterpacht's Oppenheim, II, 399-404.

Patzig was responsible, and that Dithmar and Boldt should have refused to obey Patzig's order; but the fact that "they had acquired the habit of military obedience, and could not rid themselves of it" justified the recognition of mitigating circumstances. Four years' imprisonment was imposed on Dithmar and Boldt under the State Penal Code; Dithmar was dismissed from the service, and Boldt, who had already retired, was forbidden to wear officer's uniform, both under the Military Penal Code.

The case, therefore, decides nothing whatever as to the legality of the sinking of the *Llandovery Castle* under Hague Convention (X); it is confined entirely to the subsequent firing on the lifeboats.²

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QUESTIONS AND PROBLEMS

For cases involving neutral States the materials in the next chapter should also be read.

1. War exists between States A and B. Other States are neutral. Prior to the war State A legislation required that all State A merchant vessels be incorporated in the naval reserve, and that all officers of such ships should qualify as naval reserve officers. No further action is taken after the outbreak of war. After the beginning of the war a State B cruiser encounters such a merchant vessel of State A on the high seas. The cruiser opens fire and compels the merchant vessel to surrender. Legality of this action?

2. War exists between Graustark and Zenda. Three warships of Graustark, one of them a disabled destroyer, approach a coast town of Zenda. The entrance to the harbor is mined and five airplanes are stationed in the town, but there are no other defenses. The commander of the Graustark squadron:

(a) Orders the municipal authorities to deliver up the airplanes.

(b) Requisitions the use of a drydock and two hundred laborers to repair the destroyer.

(c) Requisitions food and supplies for the squadron.

Failing to receive compliance with these demands, the commander threatens to bombard the town. Is he within his rights?

3. States X and Y are at war. Other States are neutral. Are the following acts legal?

(a) State X lays anchored mines so as completely to block access to State Y's only seaport, announcing that this has been done "solely for the purpose of preventing concentrations of enemy warships."

(b) State Y lays anchored mines along the whole of the exposed coast of State X, and announces that shipping enters this area at its own risk.

(c) State Z announces that in order to prevent violations of its neutrality it has laid a minefield in a little-frequented portion of its territorial waters.

4. Who may exercise the right of visit and search? What vessels may be visited and searched? What is the purpose of visit and search? What is the importance of the papers? Is the evidence furnished by the papers conclusive?

5. States A and B are at war; others are neutral. A cruiser of State A approaches a vessel flying the American flag and summons the vessel to lie to. The vessel flees. What action may the cruiser legally take? Suppose the vessel approached to be a vessel of State B flying the American flag?

6. States A and B are at war. Other states are neutral, including the United States. There is a dispute between the United States and State B as to contraband lists, State B claiming that foodstuffs are to be treated as absolute contraband, the United States claiming that foodstuffs are noncontraband. In this posture of affairs, several American merchant vessels laden with foodstuffs leave New York for State A under convoy of an American cruiser. The convoy is approached by a squadron of State B war vessels. What are the rights of the parties?

7. The United States is at war with State X. Other States are neutral. A United States submarine encounters the following vessels. What may the submarine legally do?

(a) A merchant vessel of State X, navigating in the territorial waters of State Y.

(b) A war vessel of State X, navigating on the high seas.

(c) A whaling vessel of State X, encountered on the high seas.

(d) A merchant vessel of State A, with 100 soldiers of State X on board. The vessel is unaware of the existence of war.

(e) A merchant vessel of State B, coming out of a State X port blockaded by the United States.

(f) A merchant vessel of the United States carrying goods with a State X destination.

(g) A merchant vessel of State C, which has on board goods which the United States has declared contraband. The vessel is bound for a port in State D, where the goods are to be transhipped to a private dealer in State X.

(h) A hospital ship of State X.

(i) A merchant vessel of State E which resists visit and search by force. (Consult also materials in Chapter XVIII, especially § 181, Art. 63.)

(j) A mail ship of State F.

(k) A military hospital ship of State X.

8. What were the circumstances of the sinking of the *Lusitania* (§ 168)? What nationality was the *Lusitania*? What is the nature of the Note of June 9, 1915? Does the opening discussion of the case of the *Falaba* throw any light on the general position of the United States? From the Note of June 9, is it possible to gather the contents of the previous German Note about the *Lusitania*? What was the German contention about masked guns? The use of the vessel as a troop transport? The carriage of cargo not permitted by American law? How could Germany contend that the vessel was, in effect "an auxiliary to the naval forces of Great Britain"? What difference did these contentions make, if they were proved?

• Did the United States contend that the *Lusitania* was not armed? How did it answer the other German contentions? Did the United States contend that the *Lusitania* was not carrying munitions?

What was the general position of the United States as to the international law of the case? Did the United States claim that in no case could the *Lusitania* have been destroyed? Explain. What do you think was the view of the United States as to what the submarine should have done?

Is this the same as the position of the United States in its Proposal of January 18, 1916 (§ 169)? Is it the same as the Rules of 1936 (§ 170)? Explain.

9. What is the nature of the German Note of July 8, 1915, on the *Lusitania* (§ 168b)? Does this Note come immediately to the point? What is the character and purpose of the elaborate introduction? What acts of Great Britain are alleged to be illegal? Were they illegal, in your opinion?

What were the German contentions about the arming of merchantmen? Instructions to merchantmen to ram submarines? What did the Note say in explanation of the fact that the commander of the submarine did not place the *Lusitania's* passengers and crew in a place of safety before discharging the torpedo? Do you think this position was justified? Does the United States accept this position in its Proposal of January 18, 1916 (§ 169)? What is the German position as to explosives on board the *Lusitania*? Did the *Lusitania* have the right to carry explosives? What was the German position with respect to citizens of neutral States traveling on board enemy vessels? What is the present position of the United States on this point (§ 191)? Did the United States at the time accept the German proposals made in this Note? What were these proposals?

10. What is the character and purpose of the American Proposal of January 18, 1916 (§ 169), as to submarine warfare? Did this proposal involve concessions by Germany? By Great Britain and her allies? Explain. Compare the proposed rules with those of 1936 and the rules proposed in 1922 (§ 170). In your judgment do the Rules of 1936 omit essential points?

11. Are there any rules now in existence as to the conduct of warfare by submarines against enemy commerce? Explain the present position.

12. Debate this question: "Germany was justified, under the rules of international law, in sinking the *Lusitania*."

13. It is granted that the Rules of 1936 regarding submarines (§ 170) are in force. Subsequently there is war between States X and Y. Other states are neutral.

(a) The *Star*, a merchant vessel owned by a citizen of and flying the flag of State Y and having its decks stiffened for the mounting of 6-inch guns, receives a summons from submarine No. 5 of State X to lie to, but the *Star* continues on its course. Submarine No. 5 communicates with submarine No. 6, which is on the course the *Star* is taking, to sink the *Star*. Submarine No. 6 without coming to the surface sinks the *Star*.

After the war, claims are made against State X on the ground that the action of the submarines was illegal. What should be the decision, and why?

(b) Would the discovery by a submarine of State X that on an enemy merchant vessel equipped in a manner similar to the *Star* 6-inch guns are mounted and pointed toward the submarine be sufficient to justify sinking of the merchant vessel even if they are not yet fired?

(c) May the submarine order a merchant vessel to accompany it under penalty of being sunk?

—Adapted from Naval War College, *International Law Situations*, 1930, p. 1.

14. War exists between States A and B. Other States are neutral. What are the legal rights of the different States in the following circumstances:

(a) State A captures a military hospital ship of State B which has not been notified to State A.

(b) A hospital ship of State B, loaded to capacity with State B sick and

wounded, encounters 150 State A sailors clinging to wreckage and in small boats as a result of their ship's having been destroyed by a mine.

(c) A cruiser of State B encounters a hospital ship of State A, the radio apparatus of which has been used to transmit military information to the State A fleet.

(d) A cruiser of State A encounters a hospital ship of State B. There are on board (1) the regular officers and crew, (2) the members of the surgical and nursing staff, all nationals of State B, (3) 200 sick and wounded of State B nationality, (4) 50 sick and wounded of State A nationality.

(e) Because State B contends its hospital ships have been sunk by submarines without warning, it has armed its hospital ships with light defensive armament. A State A cruiser encounters a hospital ship so armed.

XVIII

*Neutrality: Policy and Law*¹

A. Introduction

§ 173. THE NATURE OF NEUTRALITY

Neutrality

BY PHILIP C. JESSUP

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publishers.

The modern legal status of neutrality implies the impartiality of one state toward two or more belligerent states. During the early Middle Ages this status of neutrality was unknown; feudal obligations, ties of the empire and theories of the solidarity of Christendom militated against the adoption of such a concept. As the bonds of the empire dissolved and strong national states emerged, states found themselves free to refrain from interfering in their neighbors' quarrels and at times found it advantageous to do so. By the sixteenth century the word *neutre* was in use to describe territory accorded a position of immunity from attack and also to characterize an impartial prince who might hold territory in pledge. Well into the eighteenth century, however, "friend" was used interchangeably with "neuter" or "neutral."

In the sixteenth and seventeenth centuries the idea of impartiality was

¹ The Harvard Law School Research in International Law has published a *Draft Convention (with Comment) on Rights and Duties of Neutral States in Naval and Aerial War*, which contains an invaluable collection of basic materials, of importance for the study of every problem in this chapter. While the editor of this book believes that existing law as stated in these pages is in conformity with statements as to existing law in the Draft Convention and Comment, he has not felt justified in making the elaborate references necessary if justice were to be done to this work of the Harvard Research under Professor Jessup's leadership. The editor has omitted all references, but hopes that this notice will lead serious students of neutrality to the Draft Convention and Comment, published as a *Supplement Section* to the *American Journal of International Law*, July, 1939 (Vol. XXXIII, No. 3).

not pressed to extremes. A neuter was merely a state not participating fully in the conflict on either side. At the same time the neuter might aid one side or the other by permitting passage of troops, by allowing mercenaries to be recruited within its borders or more actively by supplying men, money or other tangible forms of assistance. As the concept developed, it came to be understood that unless such assistance were furnished in fulfilment of a prior treaty obligation, the neuter might forfeit his position. Nevertheless, levying of troops in neutral countries and furnishing money and arms were common down through the seventeenth century and the practise survived even to later times.

Neutrality in land warfare necessarily differed from neutrality in maritime warfare. Although the underlying principles were the same, the particular rules which developed had little in common. Undoubtedly the law of neutrality developed chiefly in the maritime field, as a result of the rapid increase in European sea borne trade after the end of the fifteenth century. There were, as there are today, detailed problems of neutrality on land; but far more important were those which always arise in the field of the great maritime trade. A clash of interests was inevitable: the neutral desired to continue trade unhampered by belligerent activities; the belligerent wished to interfere with the enemy's commerce, even at the expense of the neutral. Both groups frequently sought to take advantage of the war to increase their own trade. As a result of practical necessity therefore rules were gradually developed to compromise between these conflicting claims. Belligerents agreed that neutrals might in general continue to trade, even with the other belligerent; neutrals agreed to certain interferences or restrictions.

Probably the earliest accepted restriction on neutral trade related to enemy property. The *Consolato del mare* as early as 1494 registered a well developed practise on this subject. Nevertheless, conflicting interests led to diverse national attitudes, not finally reconciled until the signature of the Declaration of Paris in 1856, which embodied the rules, free ships free goods and free goods free even in enemy ships.

As early as the twelfth century belligerent states endeavored to enforce sweeping bans upon all commerce with an enemy, but neutrals did not acquiesce in such claims. The claims gradually simmered down, on the one hand, to the law of contraband of war—prohibition against trading in certain commodities—and, on the other hand, to the law of blockade—prohibition against trading with certain places which were besieged, invested or blocked up. There also gradually developed a category of acts described as unneutral service, which includes the carrying of military persons, dispatches and the like. This category is the basis for such rules as the Rule of the War of 1756, which forbade a neutral in time of war to engage in commerce that might prove helpful to a belligerent and that would be closed to the neutral in

time of peace, as, for example, the colonial trade. The neutral which carried contraband, ran a blockade or performed unneutral service ran the risk of losing ship and cargo if captured by a belligerent and found guilty by a prize court. There was general agreement upon such detailed rules as these but not upon the broad principle that a belligerent might shut off anything possibly useful to the enemy in the war.

Although as early as the sixteenth century the customary law of nations was invoked in diplomatic correspondence, the law of neutrality was formed chiefly by treaties of the seventeenth and eighteenth centuries. Since the legal rights and obligations of a neutral were but vaguely understood, governments sought precision in written undertakings. Through the middle of the seventeenth century these conventional obligations of neutrality took three forms: undertakings that the state when neutral would not itself aid the enemy of either party, except perhaps in pursuance of a prior treaty obligation; undertakings that the state would not permit its citizens or inhabitants to aid the enemy of either party; undertakings which merely note that a citizen who aids a belligerent must take the consequences and will not be protected by his own government from the penalties which the aggrieved belligerent may inflict. The conventional rights of neutrality obtained were the rather nebulous agreement to respect neutrality and stipulations regarding freedom of neutral trade at sea.

Prize courts, which were functioning in the principal maritime countries under clearly established rules of procedure as early as the middle of the sixteenth century, demonstrated how much reliance was placed upon treaties but at the same time contributed to the development of a body of customary law.

Although it is easy to exaggerate the influence of writers upon a subject like neutrality, the significance of their contribution must not be overlooked. Their books tended to strengthen infant practises and at times may have adumbrated the course of future progress. Grotius was cited in a brief before a French prize court as early as 1653, and other pleadings of the seventeenth and eighteenth centuries as well as state papers show familiarity with and reliance upon him and upon other writers. Grotius had little to say on neutrality. He calls neutrals *in bello medii* and says that although the neutral should favor the just side, in doubtful cases he should treat both sides alike—not necessarily to abstain from all aid to either, but if giving aid, to give it to both impartially. Gentili, who had practical experience in defending Spanish interests in prize cases in the early seventeenth century, had a clear notion of the territorial rights of neutrals and dealt in highly modern fashion with neutral rights at sea. One hundred years after Grotius, Bynkershoek still maintained that the neutral state (*non hostis*) fulfils its duties if it serves both sides with impartiality. Vattel was the first clearly to describe in detail

the modern concept of neutrality. He expressly rejected the idea of equal aid to both sides, asserting the modern duty to refrain from aid to either. Vattel recognized, however, that aid might be furnished to one side in compliance with a prior treaty obligation. Hübner vigorously defended the rights of neutral trade against belligerent interferences.

During this early formative period the emphasis was chiefly upon neutral rights rather than upon neutral duties, except as the latter were specifically imposed by particular treaty stipulations. There are numerous instances in the seventeenth century which show a consciousness of the idea that neutral territory must be respected by a belligerent, but little suggestion that a neutral was obliged to enforce such respect. As early as 1562 Elizabeth stated on this subject that "the territory of an indifferent and meane prince is sauf conducte in lawe." Thus the neutrality policy of the United States under Washington marks a highly significant landmark in the history of neutrality. The United States insisted that the European nations should respect its neutrality while in return it would fulfil the duties of neutrality. By this it meant that it would accept responsibility to an aggrieved belligerent for damage inflicted by its enemy within American territory. (In view particularly of the activities of Citizen Genet during this period in commissioning privateers and setting up prize courts within the jurisdiction of the United States, this was no light undertaking. Embargo and non-intercourse acts were passed by the United States to bring pressure upon the European belligerents to respect its neutral rights. After the wars the United States settled claims with both England and France. To England under one of the Jay Treaty arbitrations the United States paid a little less than \$150,000 in satisfaction of damages caused by breaches of neutral duties, while England paid to the United States over \$11,500,000 for damages caused by infringements upon neutral rights. This American payment was a precedent for the famous Geneva arbitration of the *Alabama* claims after the Civil War, under which Great Britain paid the United States \$15,500,000.

In Europe under the leadership of Russia the northern neutrals banded together in the armed neutralities of 1780 and 1800, for which there was an early precedent in the treaty of 1613 between the Dutch States General and Lübeck, accepted by Sweden in 1614. These armed neutralities were important because they added weight to certain specific rules, but their influence was short lived. As a precedent for joint action by neutrals in defense of their rights they were singularly ineffective.

The Napoleonic wars demonstrated that in any vast and vital conflict rights of neutrals would suffer. This was not a new lesson; it had been taught frequently in the seventeenth century, notably in the Anglo-Dutch wars against France. All such struggles are also contests for economic mastery. Economic weapons are employed with the post-war economic situation

kept definitely in mind. Belligerent rights are utilized in an endeavor to prevent neutrals from capturing new markets or more of the world's carrying trade, while neutrals have their own strategy for protecting and improving their positions. With the usual excuse of each that its actions were justified by the illegal acts of the enemy, the British government and Napoleon issued a series of orders and decrees, which were highly injurious to neutral trade. The slowly developed laws of blockade and contraband were swept aside in a return to the ancient pretensions of a right to ban all commerce with the enemy. Neutral protests were not very successful, nor were such retaliatory measures as those adopted by the United States. As a logical argument, however, nothing excelled Jefferson's defense of neutral rights which centered on the theme that although England might have a right to starve France, she had no right to make the United States the instrument to effect her purpose.

In the Napoleonic wars as in other wars before and since belligerents have had to consider that if established neutral rights were too flagrantly violated, the neutral might be drawn into the conflict on the enemy's side.

During the century following the Napoleonic wars neutrality had a less eventful career because of the absence of major conflicts. Each war, however, added its store of precedents to build up the legal structure. The Crimean War resulted in the Declaration of Paris of 1856, which among other achievements crystallized the law of blockade and declared privateering abolished. The Civil War contributed the rules of the Treaty of Washington of 1871, which stipulated that a neutral must use due diligence to prevent evasion of its laws for enforcing neutral duties. This standard of "due diligence" was altered at the Second Hague Conference to require the neutral to use "the means at its disposal." In the prize decisions of the United States Supreme Court the foundations were elaborated for the doctrine of "continuous voyage," which was to be pressed in the World War to the point of practical extinction of neutral rights. The Boer War led to Lord Salisbury's famous definition of goods conditionally contraband and thus supported the neutral cause. Since the neutrals were strong in the Russo-Japanese war, neutral rights were vigorously maintained during that struggle.

In the First and the Second Hague Peace Conference of 1899 and 1907 respectively neutral rights and duties in their modern form received elaborate formulation, although crucial matters such as contraband and blockade were untouched. The attempt at the Second Hague Conference to create an international prize court led to the London conference of 1909, at which all the important points of prize law were codified in the Declaration of London. Although it was never ratified by its signatories, its influence as a statement of rules and principles was great.

When the World War broke out, the law of neutrality was based upon

some three centuries of practise, upon hundreds of decisions of prize courts and upon important international instruments. But more significant were the essentially conflicting political and economic realities of which the law of neutrality registered the adjustment. Under the modern law of neutrality, in general a neutral is under a double duty: not itself to aid either belligerent and to prevent its citizens from performing certain but not all acts in aid of a belligerent. More specifically, according to the 1907 Hague Convention respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land and other recognized principles concerning land warfare the rules which follow are generally accepted. Neutral territory, including the air space above, is inviolable. Belligerents may not move troops or war supplies in transit across neutral territory. They may not set up or use for military purposes wireless stations on neutral territory. Combatant forces cannot be recruited on neutral territory. Neutrals are under a duty to prevent activities forbidden to a belligerent. The neutral is not required to restrain private individuals from crossing the frontier to serve a belligerent, from shipping arms, munitions and other contraband goods or from utilizing private telegraph and wireless facilities on behalf of belligerents. If belligerent troops enter neutral territory, they must be interned for the duration of the war. If sick and wounded are brought in, the neutral must insure their not participating again in military operations.

In regard to maritime warfare the 1907 Hague Convention concerning the Rights and Duties of Neutral Powers in Naval War is applicable. No belligerent act is to be performed in neutral territory or in neutral waters. A prize captured in neutral waters must be released by the neutral if it has the power, otherwise by the captor on demand of the neutral. Prize courts may not be established in neutral territory nor may belligerents use such territory as a base of naval operations. The neutral government may not supply a belligerent with warships, ammunition or war material but need not prevent private exports of munitions; it must use the means at its disposal to prevent the departure, fitting out or arming within its jurisdiction of any vessel destined for hostile operations. Belligerent war vessels and prizes may pass through territorial waters, but warships may not remain in port more than twenty-four hours except in special cases. They may take on in case of need a limited amount of provisions but may not increase their armament or fighting force; nevertheless, they may make repairs sufficient to render them seaworthy. The Hague convention allows neutrals to choose between allowing warships sufficient fuel to reach the nearest port of their own country and permitting them to fill their ordinary bunkers, but no warship may refuel in a port of the same neutral within three months. Belligerents may not store prizes in neutral ports; the neutral must release those which do not leave when ordered. A neutral may, however, allow prizes to

be sequestered in its ports pending decision of a prize court; this article of the Hague convention was not accepted by the United States, Great Britain, Japan and Siam. When warships of two belligerents are in the same neutral port, twenty-four hours must intervene between their departures. Warships which do not leave when required are interned by the neutral together with their officers and crews.

In each state neutral duties are enforced through the appropriate form of local control. On the outbreak of war it is customary for neutrals to issue proclamations of neutrality. These usually warn the nationals of their state against unneutral acts. When nationals are guilty of unneutral acts they will not be assisted by their governments if the belligerent penalizes them. If the act is one that the neutral state is bound to prevent, it usually punishes the offender. The neutrality laws of the United States, which with various amendments date from 1794, cover in general the international obligations of the United States as a neutral and also go further in dealing with aid to insurrectionists in countries with which the United States is at peace. The president may declare an embargo on arms and war material addressed to any American country with which the United States is at peace when it appears that the export of such materials is encouraging insurrection.

The World War again put neutrality to the test. Until the United States became a belligerent, the weight of neutral influence was a powerful factor. The United States government, however, did not defend its position as vigorously as it had in the Napoleonic period. European neutrals made their bargains with each side as best they could and with varying success. Almost from the outset, with one obvious purpose but with varying justifications, the belligerents made nugatory the legal freedom of neutral trade. Nevertheless, the economic necessities of the situation demanded neutral commerce. Both Allied and Central Powers proceeded to control the situation by extra-legal means. In addition to exercising their naval power to intercept neutral ships at sea both sides used economic and financial pressure to secure desired action by the neutrals. The British government refused bunker supplies to neutral ships which would not accept sailing orders or which traded with firms on the "blacklist." In some cases tonnage was requisitioned. Embargoes, specific and general, were placed on the European neutrals until those governments yielded to belligerent demands. A striking example is the British action in cutting Holland off from all oversea telegraph and cable services until it agreed to stop the transit of Belgian gravel bound for Germany. In most of the neutral countries trade organizations were set up to handle in a manner satisfactory to the Allies consignments of oversea shipments; some of these trade organizations were under government auspices or control, others privately operated. The best known was the Netherlands Overseas Trust. The Central Powers made similar bargains and commodities

were bartered with the neutrals under the system known as "Kompensationsverkehr." After the United States entered the war, the allied control of the neutrals was practically complete. Many of them were rationed and compelled to adapt their economy completely to allied convenience.

It was commonly asserted that conditions had so changed that the old rules had also changed. These wartime utterances, however, do not represent views now advanced by the governments of the world. Their soundness has been convincingly challenged by John Bassett Moore (*International Law and Some Current Illusions*, New York, 1924), but other writers have argued regarding the extent to which the old rules have survived the conflict. It is notable, however, that the changes are alleged to have taken place more in the field of neutral rights than in the field of neutral duties. On the whole neutral duties were strictly enforced during the war, and the violations of neutral rights were chiefly those which occurred on the high seas.

The post-war situation which has developed as a result of the creation of the League of Nations and more recently because of the general acceptance of the Pact of Paris has led to much discussion as to whether neutrality has any place in the modern world. Tangible evidence of its survival is found in the elaborate Convention on Maritime Neutrality adopted at the Sixth International Conference of American States at Havana in 1928 and since ratified by five states, and in the "neutrality treaties" concluded by several members of the League of Nations and expressly referred to in the negotiations leading up to the signature of the Pact of Paris. It seems evident also that because of the famous gap in the Covenant it is legally possible even for members of the League to be neutral in some wars. It may well be argued that in the present or future condition of world solidarity, neutrality is an antisocial status. It remains true, however, that no international agreement has definitely put an end to the law of neutrality and except for specific treaty provisions, such as those in the Covenant of the League, states may in time of war still claim neutral rights and be called upon to fulfil neutral duties.

§ 174. "NEUTRALITY" AS POLICY AND AS LAW

NOTE BY THE EDITOR

"Neutrality" is a much misunderstood term because it is used to describe both *policies* of States designed to keep them out of foreign wars, and *international law*, as embodied in rights and obligations as between neutrals and belligerents generally accepted in 1914. A State may try to pursue a "neutral policy" with the object of staying out of a foreign war, and without assuming the rights and obligations of "neutrality" as that term is understood in

international law. (See §§ 190-192, below.) These rights and their corresponding obligations are treated in this chapter as "traditional neutrality." As Professor Jessup points out, however, the *international law* of neutrality existing in 1914 was itself built up from clashes of neutral and belligerent *policies* for over three centuries. In itself it represents a reconciliation of such policies in terms of the legal rights and obligations of neutrals and belligerents.

During and since the World War, in which "traditional neutrality" was subjected to very severe strains—both by the tendency of belligerents to violate it and the failure of some neutrals, including the United States, to insist upon it—there has been a very pronounced tendency of States to re-examine the rules of "traditional neutrality." This question is asked: If the purpose of traditional neutrality is to keep the neutral State out of a war, do its rules adequately fulfill this purpose? There are many answers in the negative. One school, holding that the modern economic and social interdependence of States makes it almost impossible for a large State to remain out of a major war, maintains that any State which desires to stay at peace can do so only by co-operating to the fullest extent in preventing the outbreak of hostilities anywhere, and in punishing aggressors once hostilities have broken out. This school points out that legal obligations undertaken by Members of the League of Nations radically restrict the number of cases in which a State is at liberty to adopt a policy of traditional neutrality; it relies for peace, from the point of view of any single State, upon the general co-operation of as many States as possible against an aggressor, both before and during hostilities. A use of this method is represented by the sanctions imposed by League of Nations Members upon Italy in 1935. (See §§ 133-137 above.)

It has also been argued that a State which has ratified the "Kellogg Pact" (see § 113) is free, in case of hostilities between other States parties to the Pact, to adopt a policy partial to the State which, in its judgment, has not violated the Pact. As stated by Quincy Wright:

1. A party to the Pact responsible for initiating a state of war (a primary belligerent) will have violated the rights of all parties to the Pact and will have lost all title to its benefits from non-participating states as well as from its enemies.

2. A party to the Pact involved in a state of war but not responsible for initiating it (a secondary belligerent) will not have violated the Pact and consequently will continue entitled to its benefits not only from non-participating states but also from its enemies.

3. The other parties to the Pact, non-participating in the war or "partial," while free to keep out of the war, will have suffered a legal injury through the outbreak of war and, though bound to extend the full benefits of the tradi-

tional international law of neutrality as well as the benefits of the Pact to the secondary belligerent, will be free to deny those benefits to the primary belligerent.¹

The only true peace policy, in this general view, is one through which a State keeps out of war by co-operating in the prevention of war and in the punishment of aggressors. Such a policy would require partiality towards a State which was the victim of aggression and would not be either traditional neutrality or a true neutral policy, since a true neutral policy requires impartiality. It will be referred to in the following pages as "partiality" or a "partial policy."²

Another school, convinced that wars cannot always be prevented by practicable forms of international co-operation, believes that a single State can still remain at peace when hostilities break out elsewhere in the world, but that this cannot always be done through adopting "traditional neutrality" as neutral policy. This school is especially influential in the United States, where its views have received halting Congressional endorsement in the "neutrality acts" of 1935, 1936, 1937, and 1939 (See §§ 189, 192, below.) In general, this school believes that the United States may stay out of foreign conflicts by refusing to insist upon "rights" which, under "traditional neutrality" a neutral is entitled to claim for itself and its citizens; by making illegal commercial activities of citizens which tend to bring about clashes between neutral States and belligerent communities; and by making impartially applicable to both belligerents whatever measures of restriction are adopted. In these pages, such a policy is referred to as a "neutral policy" whenever the same measures are applied impartially to both belligerents. A fairly full statement of what is required by such a policy, with some of its limitations, is reprinted in § 189.

A third school comprises those who believe in strict adherence to "traditional neutrality" as the policy of the United States. To those who hold this view, this laboriously erected structure of traditional neutral rights and obligations represents not only the best working compromise between the interests of belligerents and neutrals, but a thoroughly workable system of law as demonstrated by over a century of practice. They regard the failure of the traditional neutral policy to keep the United States out of the World War as due not to defects in the policy itself, but to the failure of the

¹"*The Meaning of the Pact of Paris*," 27 *A.J.I.L.* (1933), 38, 59. The United States has never applied the Pact in this way.

²Discussions of this point of view may be found in Q. Wright, "The Future of Neutrality," *International Conciliation*, No. 242 (1928); P. C. Jessup, *American Neutrality and International Police*, World Peace Foundation Pamphlets, Vol. 1, No. 3 (1928); A. W. Dulles and H. F. Armstrong, *Can We Be Neutral?* (1936); C. G. Fenwick, "Neutrality and International Organization," 28 *A.J.I.L.* (1934), 334; *Foreign Policy Reports*: "American Neutrality and League Wars," by H. W. Briggs, Vol. IV, No. 2 (1928); "American Neutrality in a Future War," by H. W. Briggs and R. L. Buell, Vol. XI, No. 3 (1935).

United States to interpret correctly, and insist upon, its traditional neutral rights as against both Great Britain and Germany. To them, abandonment of the rights of neutrals as conceived by traditional neutrality means abandonment of peaceful neutral commerce to belligerents, the sacrifice of the freedom of the seas, and encouragement to warmakers throughout the world.³

It seems best to begin with the concepts of this third school; §§ 175-187 are accordingly devoted to traditional neutrality.

B. Traditional Neutrality

§ 175. THE BEGINNING OF NEUTRALITY: ACTS FORBIDDEN TO INHABITANTS OF A NEUTRAL STATE

President Wilson's Proclamation of Neutrality, August 4, 1914¹

U. S. *Statutes at Large*, Vol. 38, pp. 1999-2002.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Whereas a state of war unhappily exists between Austria-Hungary and Serbia and between Germany and Russia and between Germany and France; And Whereas the United States is on terms of friendship and amity

³ See E. M. Borchard and W. P. Lage, *Neutrality for the United States* (1937); J. B. Moore, "Appeal to Reason," *Foreign Affairs*, July, 1933, pp. 547-588.

¹ The outbreak of war on September 1, 1939, between Great Britain and France on the one side and Germany on the other, led to a number of "Proclamations of Neutrality" by President Roosevelt. One of these, of September 5, was issued "under international law"; it is generally similar to that of President Wilson, though variations are noted in footnotes below. Other proclamations were issued under the terms of the "Neutrality Acts" of 1937 and 1939 respectively. These are noted in §§ 190-192 below. The distinction is important, for while the Acts of 1937 and 1939 forbid in domestic legislation the exercise of certain rights which American citizens enjoyed under international law, the official position of the Government is that American rights under international law have not been abandoned. "The Government of the United States has not abandoned any of its rights as a neutral under international law. It has, however, for the time being prescribed, by domestic legislation, certain restrictions for its nationals. . . . These restrictive measures do not and cannot constitute a modification of the principles of international law but rather they require nationals of the United States to forego, *until the Congress shall decide otherwise*, the exercise of certain rights under these principles. . . . The principles of international law as regards neutrals and belligerents have been evolved through the centuries. While belligerents have frequently departed from these principles on one pretext or another and have endeavored to justify their action on various grounds, the principles still subsist. This Government, adhering as it does to these principles, *reserves all rights of the United States and its nationals under international law and will adopt such measures as may seem most practical and prudent when those rights are violated by any of the belligerents.*" (All italics supplied.)—Statement by Secretary of State Hull, September 14, Department of State *Bulletin*, September 16, 1939, p. 245.

with the contending powers, and with the persons inhabiting their several dominions;

And Whereas there are citizens of the United States residing within the territories or dominions of each of the said belligerents and carrying on commerce, trade, or other business or pursuits therein;

And Whereas there are subjects of each of the said belligerents residing within the territory or jurisdiction of the United States, and carrying on commerce, trade, or other business or pursuits therein;

And Whereas the laws and treaties of the United States, without interfering with the free expression of opinion and sympathy, or with the commercial manufacture or sale of arms or munitions of war, nevertheless impose upon all persons who may be within their territory and jurisdiction the duty of an impartial neutrality during the existence of the contest;

And Whereas it is the duty of a neutral government not to permit or suffer the making of its waters subservient to the purposes of war;

Now, Therefore, I, Woodrow Wilson, President of the United States of America, in order to preserve the neutrality of the United States and of its citizens and of persons within its territory and jurisdiction, and to enforce its laws and treaties, and in order that all persons, being warned of the general tenor of the laws and treaties of the United States in this behalf, and of the law of nations, may thus be prevented from any violation of the same, do hereby declare and proclaim that by certain provisions of the act approved on the 4th day of March, A. D. 1909, commonly known as the "Penal Code of the United States" the following acts are forbidden to be done, under severe penalties, within the territory and jurisdiction of the United States, to-wit:—

1. Accepting and exercising a commission to serve either of the said belligerents by land or by sea against the other belligerent.
2. Enlisting or entering into the service of either of the said belligerents as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer.
3. Hiring or retaining another person to enlist or enter himself in the service of either of the said belligerents as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer.
4. Hiring another person to go beyond the limits or jurisdiction of the United States with intent to be enlisted as aforesaid.
5. Hiring another person to go beyond the limits of the United States with intent to be entered into service as aforesaid.
6. Retaining another person to go beyond the limits of the United States with intent to be enlisted as aforesaid.
7. Retaining another person to go beyond the limits of the United States with intent to be entered into service as aforesaid. (But the said act is

not to be construed to extend to a citizen or subject of either belligerent who, being transiently within the United States, shall, on board of any vessel of war, which, at the time of its arrival within the United States, was fitted and equipped as such vessel of war, enlist or enter himself or hire or retain another subject or citizen of the same belligerent, who is transiently within the United States, to enlist or enter himself to serve such belligerent on board such vessel of war, if the United States shall then be at peace with such belligerent.)

8. Fitting out and arming, or attempting to fit out and arm, or procuring to be fitted out and armed, or knowingly being concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of either of the said belligerents.

9. Issuing or delivering a commission within the territory of jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid.

10. Increasing or augmenting, or procuring to be increased or augmented, or knowingly being concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which at the time of her arrival within the United States was a ship of war, cruiser, or armed vessel in the service of either of the said belligerents, or belonging to the subjects of either, by adding to the number of guns of such vessels, or by changing those on board of her for guns of a larger calibre, or by the addition thereto of any equipment solely applicable to war.

11. Beginning or setting on foot or providing or preparing the means for any military expedition or enterprise to be carried on from the territory or jurisdiction of the United States against the territories or dominions of either of the said belligerents.²

² The Proclamation of President Roosevelt, September 5, 1939, under international law, follows substantially the items 1-11 as printed above. Items 12-17 are new, and are reprinted below:

12. Despatching from the United States, or any place subject to the jurisdiction thereof, any vessel, domestic or foreign, which is about to carry to a warship, tender, or supply ship of a belligerent any fuel, arms, ammunition, men, supplies, despatches, or information shipped or received on board within the jurisdiction of the United States.

13. Despatching from the United States, or any place subject to the jurisdiction thereof, any armed vessel owned wholly or in part by American citizens, or any vessel, domestic or foreign (other than one which has entered the jurisdiction of the United States as a public vessel), which is manifestly built for warlike purposes or has been converted or adapted from a private vessel to one suitable for warlike use, and which is to be employed to cruise against or commit or attempt to commit hostilities upon the subjects, citizens, or property of a belligerent nation, or which will be sold or delivered to a belligerent nation, or to an agent, officer, or citizen thereof, within the jurisdiction of the United States, or, having left that jurisdiction, upon the high seas.

14. Despatching from the United States, or any place subject to the jurisdiction thereof, any vessel built, armed, or equipped as a ship of war, or converted from a private vessel into a ship of war (other than one which has entered the jurisdiction of the United States as a public vessel), with any intent or under any agreement or contract, written or oral, that such vessel shall be delivered to a belligerent nation, or to any agent, officer, or citizen

[Elaborate regulations as to the use of the territories, territorial waters, and ports of the United States are omitted.³]

of such nation, or where there is reasonable cause to believe that the said vessel shall or will be employed in the service of such belligerent nation after its departure from the jurisdiction of the United States.

15. Taking, or attempting or conspiring to take, or authorizing the taking of any vessel out of port or from the jurisdiction of the United States in violation of the said act of the 15th day of June, A. D. 1917, as set forth in the preceding paragraphs numbered 11 to 14 inclusive.

16. Leaving or attempting to leave the jurisdiction of the United States by a person belonging to the armed land or naval forces of a belligerent who shall have been interned within the jurisdiction of the United States in accordance with the law of nations, or leaving or attempting to leave the limits of internment in which freedom of movement has been allowed, without permission from the proper official of the United States in charge, or willfully overstaying a leave of absence granted by such official.

17. Aiding or enticing any interned person to escape or attempt to escape from the jurisdiction of the United States, or from the limits of internment prescribed.—Department of State *Bulletin*, September 9, 1939, 204-205.

³ The parts of President Roosevelt's Proclamation of September 5, 1939, under international law, corresponding to these omissions, are as follows:

And I do hereby further declare and proclaim that any frequenting and use of the waters within the territorial jurisdiction of the United States by the vessels of a belligerent, whether public ships or privateers for the purpose of preparing for hostile operations, or as posts of observation upon the ships of war or privateers or merchant vessels of an opposing belligerent must be regarded as unfriendly and offensive, and in violation of that neutrality which it is the determination of this government to observe; and to the end that the hazard and inconvenience of such apprehended practices may be avoided, I further proclaim and declare that from and after the fifth day of September instant, and so long as this proclamation shall be in effect, no ship of war or privateer of any belligerent shall be permitted to make use of any port, harbor, roadstead, or waters subject to the jurisdiction of the United States as a station or place of resort for any warlike purpose or for the purpose of obtaining warlike equipment; no privateer of a belligerent shall be permitted to depart from any port, harbor, roadstead, or waters subject to the jurisdiction of the United States, and no ship of war of a belligerent shall be permitted to sail out of or leave any port, harbor, roadstead, or waters subject to the jurisdiction of the United States from which a vessel of an opposing belligerent (whether the same shall be a ship of war or a merchant ship) shall have previously departed, until after the expiration of at least twenty-four hours from the departure of such last mentioned vessel beyond the jurisdiction of the United States.

If any ship of war of a belligerent shall, after the time this notification takes effect, be found in, or shall enter any port, harbor, roadstead, or waters subject to the jurisdiction of the United States, such vessel shall not be permitted to remain in such port, harbor, roadstead, or waters more than twenty-four hours, except in case of stress of weather, or for delay in receiving supplies or repairs, or when detained by the United States; in any of which cases the authorities of the port, or of the nearest port (as the case may be), shall require her to put to sea as soon as the cause of the delay is at an end, unless within the preceding twenty-four hours a vessel, whether ship of war or merchant ship of an opposing belligerent, shall have departed therefrom, in which case the time limited for the departure of such ship of war shall be extended so far as may be necessary to secure an interval of not less than twenty-four hours between such departure and that of any ship of war or merchant ship of an opposing belligerent which may have previously quit the same port, harbor, roadstead, or waters.

Vessels used exclusively for scientific, religious, or philanthropic purposes are exempted from the foregoing provisions as to the length of time ships of war may remain in the ports, harbors, roadsteads, or waters subject to the jurisdiction of the United States.

The maximum number of ships of war belonging to a belligerent and its allies which may be in one of the ports, harbors, or roadsteads subject to the jurisdiction of the United States simultaneously shall be three.

When ships of war of opposing belligerents are present simultaneously in the same port, harbor, roadstead, or waters, subject to the jurisdiction of the United States, the one

And I do further declare and proclaim that the statutes and the treaties of the United States and the law of nations alike require that no person, within the territory and jurisdiction of the United States, shall take part,

entering first shall depart first, unless she is in such condition as to warrant extending her stay. In any case the ship which arrived later has the right to notify the other through the competent local authority that within twenty-four hours she will leave such port, harbor, roadstead, or waters, the one first entering, however, having the right to depart within that time. If the one first entering leaves, the notifying ship must observe the prescribed interval of twenty-four hours. If a delay beyond twenty-four hours from the time of arrival is granted, the termination of the cause of delay will be considered the time of arrival in deciding the right of priority in departing.

Vessels of a belligerent shall not be permitted to depart successively from any port, harbor, roadstead, or waters subject to the jurisdiction of the United States at such intervals as will delay the departure of a ship of war of an opposing belligerent from such ports, harbors, roadsteads, or waters for more than twenty-four hours beyond her desired time of sailing. If, however, the departure of several ships of war and merchant ships of opposing belligerents from the same port, harbor, roadstead, or waters is involved, the order of their departure therefrom shall be so arranged as to afford the opportunity of leaving alternately to the vessels of the opposing belligerents, and to cause the least detention consistent with the objects of this proclamation.

All belligerent vessels shall refrain from use of their radio and signal apparatus while in the harbors, ports, roadsteads, or waters subject to the jurisdiction of the United States, except for calls of distress and communications connected with safe navigation or arrangements for the arrival of the vessel within, or departure from, such harbors, ports, roadsteads, or waters, or passage through such waters; provided that such communications will not be of direct material aid to the belligerent in the conduct of military operations against an opposing belligerent. The radio of belligerent merchant vessels may be sealed by the authorities of the United States, and such seals shall not be broken within the jurisdiction of the United States except by proper authority of the United States.

No ship of war of a belligerent shall be permitted, while in any port, harbor, roadstead, or waters subject to the jurisdiction of the United States, to take in any supplies except provisions and such other things as may be requisite for the subsistence of her crew in amounts necessary to bring such supplies to her peace standard, and except such fuel, lubricants, and feed water only as may be sufficient, with that already on board, to carry such vessel, if without any sail power, to the nearest port of her own country; or in case a vessel is rigged to go under sail, and may also be propelled by machinery, then half the quantity of fuel, lubricants, and feed water which she would be entitled to have on board, if dependent upon propelling machinery alone, and no fuel, lubricants, or feed water shall be again supplied to any such ship of war in the same or any other port, harbor, roadstead, or waters subject to the jurisdiction of the United States until after the expiration of three months from the time when such fuel, lubricants and feed water may have been last supplied to her within waters subject to the jurisdiction of the United States. The amounts of fuel, lubricants, and feed water allowable under the above provisions shall be based on the economical speed of the vessel, plus an allowance of thirty per centum for eventualities.

No ship of war of a belligerent shall be permitted, while in any port, harbor, roadstead, or waters subject to the jurisdiction of the United States, to make repairs beyond those that are essential to render the vessel seaworthy and which in no degree constitute an increase in her military strength. Repairs shall be made without delay. Damages which are found to have been produced by the enemy's fire shall in no case be repaired.

No ship of war of a belligerent shall effect repairs or receive fuel, lubricants, feed water, or provisions within the jurisdiction of the United States without written authorization of the proper authorities of the United States. Before such authorization will be issued, the commander of the vessel shall furnish to such authorities a written declaration, duly signed by such commander, stating the date, port, and amounts of supplies last received in the jurisdiction of the United States, the amounts of fuel, lubricants, feed water, and provisions on board, the port to which the vessel is proceeding, the economical speed of the vessel, the rate of consumption of fuel, lubricants, and feed water at such speed, and the amount of each class of supplies desired. If repairs are desired, a similar declaration shall be furnished stating the cause of the damage and the nature of the repairs. In either

directly or indirectly, in the said wars, but shall remain at peace with all of the said belligerents, and shall maintain a strict and impartial neutrality.

And I do hereby enjoin all citizens of the United States, and all persons residing or being within the territory or jurisdiction of the United States, to observe the laws thereof, and to commit no act contrary to the provisions of the said statutes or treaties or in violation of the law of nations in that behalf.

And I do hereby warn all citizens of the United States, and all persons residing or being within its territory or jurisdiction that, while the free and full expression of sympathies in public and private is not restricted by the laws of the United States, military forces in aid of a belligerent can not lawfully be originated or organized within its jurisdiction; and that, while all persons may lawfully and without restriction by reason of the aforesaid state of war manufacture and sell within the United States arms and munitions of war, and other articles ordinarily known as "contraband of war," yet they cannot carry such articles upon the high seas for the use or service of a belligerent, nor can they transport soldiers and officers of a belligerent, or attempt to break any blockade which may be lawfully established and maintained during the said wars without incurring the risk of hostile capture and the penalties denounced by the law of nations in that behalf.

And I do hereby give notice that all citizens of the United States and others who may claim the protection of this government, who may misconduct themselves in the premises, will do so at their peril, and that they can in no wise obtain any protection from the government of the United States against the consequences of their misconduct.

In Witness Whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

case, a certificate shall be included to the effect that the desired services are in accord with the rules of the United States in that behalf.

No agency of the United States Government shall, directly or indirectly, provide supplies nor effect repairs to a belligerent ship of war.

No vessel of a belligerent shall exercise the right of search within the waters under the jurisdiction of the United States, nor shall prizes be taken by belligerent vessels within such waters. Subject to any applicable treaty provisions in force, prizes captured by belligerent vessels shall not enter any port, harbor, roadstead, or waters under the jurisdiction of the United States except in case of unseaworthiness, stress of weather, or want of fuel or provisions; when the cause has disappeared, the prize must leave immediately, and if a prize captured by a belligerent vessel enters any port, harbor, roadstead, or waters subject to the jurisdiction of the United States for any other reason than on account of unseaworthiness, stress of weather, or want of fuel or provisions, or fails to leave as soon as the circumstances which justified the entrance are at an end, the prize with its officers and crew will be released and the prize crew will be interned. A belligerent Prize Court cannot be set up on territory subject to the jurisdiction of the United States or on a vessel in the ports, harbors, roadsteads, or waters subject to the jurisdiction of the United States.

The provisions of this proclamation pertaining to ships of war shall apply equally to any vessel operating under public control for hostile or military purposes.—Department of State *Bulletin*, September 9, 1939, 205-207.

Done at the city of Washington this fourth day of August in the year of our Lord one thousand nine hundred and fourteen and of the independence of the United States of America the one hundred and thirty-ninth.

[SEAL]

WOODROW WILSON

By the President:

WILLIAM JENNINGS BRYAN

*Secretary of State*⁴

§ 176. THE OBLIGATION TO PREVENT USE OF THE NEUTRAL TERRITORY AS A BASE OF BELLIGERENT OPERATIONS

The Alabama Claims Award

UNITED STATES-GREAT BRITAIN, ARBITRATION UNDER THE TREATY OF MAY 8, 1871.
1872.

Papers Relating to the Treaty of Washington, IV, 49-54.

[By the Treaty of Washington, of May 8, 1871, the United States and Great Britain referred to a tribunal of five arbitrators the claims growing out of acts committed by several vessels and "generically known as the 'Alabama Claims.'" The treaty provided (Article VI) that the arbitrators "shall be governed by the following three rules, which are agreed upon by the high contracting parties as rules to be taken as applicable to the case, and by such principles of international law not inconsistent therewith as the Arbitrators shall determine to have been applicable to the case:

["A neutral Government is bound—

["First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

["Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

["Thirdly. To exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

⁴ For a general analysis of existing neutrality legislation of the United States see E. Dumbauld, "Neutrality Laws of the United States," 31 *A.J.I.L.* (1937), 254.—ED.

[“Her Britannic Majesty has commanded her High Commissioners and Plenipotentiaries to declare that Her Majesty’s Government cannot assent to the foregoing rules as a statement of principles of international law which were in force at the time when the claims mentioned in Article I arose, but that Her Majesty’s Government, in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provision for the future, agrees that in deciding the questions between the two countries arising out of those claims, the Arbitrators should assume that Her Majesty’s Government had undertaken to act upon the principles set forth in these rules.

[“And the high contracting parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime powers, and to invite them to accede to them.”]

[By the Tribunal: Adams, Sclopis, Stämpfli, D’Itajuba.] . . . The Tribunal having since fully taken into their consideration the treaty, and also the cases, counter-cases, documents, evidence, and arguments, and likewise all other communications made to them by the two parties during the progress of their sittings, and having impartially and carefully examined the same,

Has arrived at the decision embodied in the present award:

Whereas, having regard to the VIth and VIIth articles of the said treaty, the arbitrators are bound under the terms of the said VIth article, “in deciding the matters submitted to them, to be governed by the three rules therein specified and by such principles of international law, not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case;”

And whereas the “due diligence” referred to in the first and third of the said rules ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part;

And whereas the circumstances out of which the facts constituting the subject-matter of the present controversy arose were of a nature to call for the exercise on the part of Her Britannic Majesty’s government of all possible solicitude for the observance of the rights and the duties involved in the proclamation of neutrality issued by Her Majesty on the 13th day of May, 1861;

And whereas the effects of a violation of neutrality committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the government of the belligerent power, benefited by the violation of neutrality, may afterwards have granted to that vessel; and the ultimate step, by which the offense is completed, cannot be

admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence;

And whereas the privilege of extritoriality accorded to vessels of war has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality;

And whereas the absence of a previous notice cannot be regarded as a failure in any consideration required by the law of nations, in those cases in which a vessel carries with it its own condemnation;

And whereas, in order to impart to any supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters, as a base of naval operations for a belligerent, it is necessary that the said supplies should be connected with special circumstances of time, of persons, or of place, which may combine to give them such character;

And whereas, with respect to the vessel called the *Alabama*, it clearly results from all the facts relative to the construction of the ship at first designated by the number "290" in the port of Liverpool, and its equipment and armament in the vicinity of Terceira through the agency of the vessels called the "*Agrippina*" and the "*Bahama*," dispatched from Great Britain to that end, that the British government failed to use due diligence in the performance of its neutral obligations; and especially that it omitted, notwithstanding the warnings and official representations made by the diplomatic agents of the United States during the construction of the said number "290," to take in due time any effective measures of prevention, and that those orders which it did give at last, for the detention of the vessel, were issued so late that their execution was not practicable;

And whereas, after the escape of that vessel, the measures taken for its pursuit and arrest were so imperfect as to lead to no result, and therefore cannot be considered sufficient to release Great Britain from the responsibility already incurred;

And whereas, in despite of the violations of the neutrality of Great Britain committed by the "290," this same vessel, later known as the confederate cruiser *Alabama*, was on several occasions freely admitted into the ports of colonies of Great Britain, instead of being proceeded against as it ought to have been in any and every port within British jurisdiction in which it might have been found;

And whereas the government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed:

Four of the arbitrators, for the reasons above assigned, and the fifth for reasons separately assigned by him,

Are of opinion—

That Great Britain has in this case failed, by omission, to fulfil the duties prescribed in the first and the third of the rules established by the VIth article of the treaty of Washington.

And whereas, with respect to the vessel called the "Florida," it results from all the facts relative to the construction of the "Oreto" in the port of Liverpool, and to its issue therefrom, which facts failed to induce the authorities in Great Britain to resort to measures adequate to prevent the violation of the neutrality of that nation, notwithstanding the warnings and repeated representations of the agents of the United States, that Her Majesty's government has failed to use due diligence to fulfil the duties of neutrality;

And whereas it likewise results from all the facts relative to the stay of the "Oreto" at Nassau, to her issue from that port, to her enlistment of men, to her supplies, and to her armament, with the co-operation of the British vessel "Prince Alfred," at Green Cay, that there was negligence on the part of the British colonial authorities;

And whereas, notwithstanding the violation of the neutrality of Great Britain committed by the Oreto, this same vessel, later known as the confederate cruiser Florida, was nevertheless on several occasions freely admitted into the ports of British colonies;

And whereas the judicial acquittal of the Oreto at Nassau cannot relieve Great Britain from the responsibility incurred by her under the principles of international law; nor can the fact of the entry of the Florida into the confederate port of Mobile, and of its stay there during four months, extinguish the responsibility previously to that time incurred by Great Britain:

For these reasons,

The tribunal, by a majority of four voices to one, is of opinion—

That Great Britain has in this case failed, by omission, to fulfil the duties prescribed in the first, in the second, and in the third of the rules established by Article VI of the treaty of Washington.

And whereas, with respect to the vessel called the "Shenandoah," it results from all the facts relative to the departure from London of the merchant-vessel the "Sea King," and to the transformation of that ship into a confederate cruiser under the name of the Shenandoah, near the island of Madeira, that the government of Her Britannic Majesty is not chargeable with any failure, down to that date, in the use of due diligence to fulfil the duties of neutrality;

But whereas it results from all the facts connected with the stay of the Shenandoah at Melbourne, and especially with the augmentation which the British government itself admits to have been clandestinely effected of her

force, by the enlistment of men within that port, that there was negligence on the part of the authorities at that place:

For these reasons,

The tribunal is unanimously of opinion—

That Great Britain has not failed, by any act or omission, “to fulfil any of the duties prescribed by the three rules of Article VI in the treaty of Washington, or by the principles of international law not inconsistent therewith,” in respect to the vessel called the *Shenandoah*, during the period of time anterior to her entry into the port of Melbourne; . . .

And whereas, so far as relates to the particulars of the indemnity claimed by the United States, the costs of pursuit of the confederate cruisers are not, in the judgment of the tribunal, properly distinguishable from the general expenses of the war carried on by the United States:

The tribunal is, therefore, of opinion, by a majority of three to two voices—

That there is no ground for awarding to the United States any sum by way of indemnity under this head.

And whereas prospective earnings cannot properly be made the subject of compensation, inasmuch as they depend in their nature upon future and uncertain contingencies:

The tribunal is unanimously of opinion—

That there is no ground for awarding to the United States any sum by way of indemnity under this head.

And whereas, in order to arrive at an equitable compensation for the damages which have been sustained, it is necessary to set aside all double claims for the same losses, and all claims for “gross freights,” so far as they exceed “net freights”;

And whereas it is just and reasonable to allow interest at a reasonable rate;

And whereas, in accordance with the spirit and letter of the treaty of Washington, it is preferable to adopt the form of adjudication of a sum in gross, rather than to refer the subject of compensation for further discussion and deliberation to a board of assessors, as provided by Article X of the said treaty:

The tribunal, making use of the authority conferred upon it by Article VII of the said treaty, by a majority of four voices to one, awards to the United States a sum of \$15,500,000 in gold, as the indemnity to be paid by Great Britain to the United States, for the satisfaction of all the claims referred to the consideration of the tribunal, conformably to the provisions contained in Article VII of the aforesaid treaty.

And, in accordance with the terms of Article XI of the said treaty, the

tribunal declares that "all the claims referred to in the treaty as submitted to the tribunal are hereby fully, perfectly, and finally settled."

Furthermore it declares, that "each and every one of the said claims, whether the same may or may not have been presented to the notice of, or made, preferred, or laid before the tribunal, shall henceforth be considered and treated as finally settled, barred, and inadmissible." . . .

§ 177. RIGHTS AND DUTIES OF NEUTRALS IN CASE OF WAR ON LAND

Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land

SIGNED AT THE HAGUE, OCTOBER 18, 1907¹

English text from J. B. Scott, *Hague Conventions and Declarations of 1899 and 1907* (1915), pp. 133-137.

[Names of signatories, preamble, and names of plenipotentiaries are omitted.]

CHAPTER I. *The Rights and Duties of Neutral Powers*

ARTICLE 1. The territory of neutral Powers is inviolable.

ARTICLE 2. Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power.²

ARTICLE 3. Belligerents are likewise forbidden to—

(a) Erect on the territory of a neutral Power a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea;

(b) Use any installation of this kind established by them before the war on the territory of a neutral Power for purely military purposes, and which has not been opened for the service of public messages.

ARTICLE 4. Corps of combatants can not be formed nor recruiting agencies opened on territory of a neutral Power to assist the belligerents.

ARTICLE 5. A neutral Power must not allow any of the acts referred to in Articles 2 to 4 to occur on its territory.

It is not called upon to punish acts in violation of its neutrality unless the said acts have been committed on its own territory.

¹ This Convention has been ratified or adhered to by the following States: Austria (deposited ratifications October 25, 1937), Austria-Hungary, Belgium, Bolivia, Brazil, China, Cuba, Denmark, El Salvador, Ethiopia (adhered August 5, 1935), Finland (adhered June 9, 1922), France, Germany, Guatemala, Haiti, Japan, Liberia, Luxemburg, Mexico, Netherlands, Nicaragua, Norway, Panama, Poland (adhered May 9, 1925), Portugal, Roumania, Russia, Siam, Spain, Sweden, Switzerland, and the United States of America. (As of August, 1939.)

Servia did not ratify or adhere to this Convention, and under its Article 20 it was not binding on any of the belligerents in the World War of 1914.—Ed.

² Compare Article 16, Covenant of the League of Nations, at page 566.—Ed.

ARTICLE 6. The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.³

ARTICLE 7. A neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet.⁴

ARTICLE 8. A neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals.

ARTICLE 9. Every measure of restriction or prohibition taken by a neutral Power in regard to the matters referred to in Articles 7 and 8 must be impartially applied by it to both belligerents.

A neutral Power must see to the same obligation being observed by companies or private individuals owning telegraph or telephone cables or wireless telegraphy apparatus.

ARTICLE 10. The fact of a neutral Power resisting, even by force, attempts to violate its neutrality can not be regarded as a hostile act.

CHAPTER II. *Belligerents Interned and Wounded Tended in Neutral Territory*

ARTICLE 11. A neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war.

It may keep them in camps and even confine them in fortresses or in places set apart for this purpose.

It shall decide whether officers can be left at liberty on giving their parole not to leave the neutral territory without permission.

ARTICLE 12. In the absence of a special convention to the contrary, the neutral Power shall supply the interned with the food, clothing, and relief required by humanity.

At the conclusion of peace the expenses caused by the internment shall be made good.

ARTICLE 13. A neutral Power which receives escaped prisoners of war shall leave them at liberty. If it allows them to remain in its territory it may assign them a place of residence.

The same rule applies to prisoners of war brought by troops taking refuge in the territory of a neutral Power.

³ The Havana Convention of 1928 on Maritime Neutrality provides as follows: "ART. 23. Neutral States shall not oppose the voluntary departure of nationals of belligerent States even though they leave simultaneously in great numbers; but they may oppose the voluntary departure of their own nationals going to enlist in the armed forces."—Ed.

⁴ But see recent American "neutrality" legislation, §§ 190-192 below.—Ed.

ARTICLE 14. A neutral Power may authorize the passage over its territory of the sick and wounded belonging to the belligerent armies, on condition that the trains bringing them shall carry neither personnel nor war material. In such a case, the neutral Power is bound to take whatever measures of safety and control are necessary for the purpose.

The sick or wounded brought under these conditions into neutral territory by one of the belligerents, and belonging to the hostile party, must be guarded by the neutral Power so as to ensure their not taking part again in the military operations. The same duty shall devolve on the neutral State with regard to wounded or sick of the other army who may be committed to its care.

ARTICLE 15. The Geneva Convention applies to sick and wounded interned in neutral territory.

CHAPTER III. *Neutral Persons*

ARTICLE 16. The nationals of a State which is not taking part in the war are considered as neutrals.

ARTICLE 17. A neutral can not avail himself of his neutrality—

(a) If he commits hostile acts against a belligerent;

(b) If he commits acts in favor of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties.

In such a case, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act.

ARTICLE 18. The following acts shall not be considered as committed in favor of one belligerent in the sense of Article 17, letter (b):

(a) Supplies furnished or loans made to one of the belligerents, provided that the person who furnishes the supplies or who makes the loans lives neither in the territory of the other party nor in the territory occupied by him, and that the supplies do not come from these territories;

(b) Services rendered in matters of police or civil administration.

CHAPTER IV. *Railway Material*

ARTICLE 19. Railway material coming from the territory of neutral Powers, whether it be the property of the said Powers or of companies or private persons, and recognizable as such, shall not be requisitioned or utilized by a belligerent except where and to the extent that it is absolutely necessary. It shall be sent back as soon as possible to the country of origin.

A neutral Power may likewise, in case of necessity, retain and utilize to an equal extent material coming from the territory of the belligerent Power.

Compensation shall be paid by one party or the other in proportion to the material used, and to the period of usage.

* CHAPTER V. *Final Provisions*

ARTICLE 20. The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention.

[Articles 21-25, dealing with ratifications, denunciations, and so on, and the signatures, are omitted.]

§ 178. RIGHTS AND DUTIES OF NEUTRALS IN NAVAL WAR

Hague Convention (XIII) of 1907 is reprinted as the chief international instrument in existence during the World War of 1914 on the subject of maritime neutrality, although it was not binding as a Convention on any of the belligerents during that war. That its principles are to be regarded as an accurate statement of law, however, may be seen in the fact that two important recent international agreements on the subject follow substantially the provisions of Hague Convention (XIII): the *Convention on Maritime Neutrality*, adopted at Havana, February 20, 1928, and in force (January, 1939) as between Bolivia, Colombia, Dominican Republic, Ecuador, Haiti, Mexico, Nicaragua, and the United States of America (with reservation); and a *Declaration Regarding Similar Rules of Neutrality*, signed at Stockholm May 27, 1938, by Denmark, Finland, Iceland, Norway, and Sweden.

The texts of these two instruments are referred to in footnotes to the text of Hague Convention (XIII) below: the first is cited as Havana Convention, and the second as the Stockholm Rules. Texts of the former may be found in *United States Treaty Series*, No. 845, and in Hudson, *International Legislation*, No. 193; and of the latter in 32 *American Journal of International Law* (Supp., October, 1938), 141.

Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War

SIGNED AT THE HAGUE, OCTOBER 18, 1907¹

English text from J. B. Scott, *Hague Conventions and Declarations of 1899 and 1907* (1915), pp. 209-215.

[Names of signatories, preamble, and names of plenipotentiaries omitted.]

ARTICLE I. Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from

¹ This Convention has been ratified or adhered to by the following States: Austria (deposited ratification October 25, 1937), Austria-Hungary, Belgium, Brazil, China (with reservation), Denmark, El Salvador, Ethiopia (adhered August 5, 1935), Finland (adhered June 9, 1922), France, Germany (with reservation), Guatemala, Haiti, Japan (with reservation), Liberia, Luxemburg, Mexico, Netherlands, Nicaragua, Norway, Panama, Portugal, Roumania, Russia, Siam (with reservation), Sweden, Switzerland, and the United States of America (with reservation). The adhesion of the United States was "subject to the reservation and exclusion of its Article 23 and with the understanding that the last clause of Article 3

any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.

ARTICLE 2. Any act of hostility, including capture and the exercise of the right of search, committed by belligerent war-ships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden.²

ARTICLE 3. When a ship has been captured in the territorial waters of a neutral Power, this Power must employ, if the prize is still within its jurisdiction, the means at its disposal to release the prize with its officers and crew, and to intern the prize crew.²

If the prize is not in the jurisdiction of the neutral Power, the captor Government, on the demand of that Power, must liberate the prize with its officers and crew.

ARTICLE 4. A prize court can not be set up by a belligerent on neutral territory or on a vessel in neutral waters.³

ARTICLE 5. Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea.⁴

ARTICLE 6. The supply, in any manner, directly or indirectly, by a

thereof implies the duty of a neutral Power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction." The reservation of Germany related to Articles 11, 12, 13, and 20, and that of Japan to Articles 19 and 23. Great Britain did not ratify the Convention. (As of August, 1939.)

Servia did not ratify or adhere to this Convention, and under its Article 28 it was not binding on any of the belligerents during the World War of 1914.—Ed.

²The Havana Convention, Article 3, is similar in principle. The Stockholm Rules, Article 9, provide: "1. Belligerent warships and military aircraft are required to respect the sovereign rights of the Kingdom [Denmark, etc.] and to abstain from all acts which would be contrary to its neutrality. 2. All acts of hostility are prohibited within the limits of Danish [Finnish, etc.] territory, including arrest, visit and capture of vessels and of aircraft, whether neutral or belonging to the adversary. Any vessel or aircraft which may have been captured therein must be immediately released, together with its officers, crew, and cargo."—Ed.

³Stockholm Rules, Article 7, paragraph 2, provide: "No prize court may be established by a belligerent either on Danish [Finnish, etc.] territory or on a ship in Danish [Finnish, etc.] territorial waters. The sale of prizes in a Danish [Finnish, etc.] port or anchorage is equally prohibited."—Ed.

⁴The Havana Convention, Article 4, is similar, but it also forbids belligerents in neutral waters to make use of radio or other installations for communication which "it may have established before the war and which may not have been opened to the public."

The Stockholm Rules prohibit belligerents from making Danish (etc.) territory the base of military operations (Art. 11), installing or operating apparatus "destined to serve as a means of communication with the belligerent forces, whether military, naval, or aerial," employing "mobile radiotelegraphic stations" in Danish (etc.) territory, except in case of distress or through Danish authorities (Art. 12), carrying out in Danish (etc.) territory "observations from an aircraft, or in any other manner, relating to the movements, operations, or defense works of a belligerent with a view to informing the other belligerent" (Art. 13), and establishing fuel depots, either on Danish (etc.) soil or on vessels stationed in Danish (etc.) territorial waters. Vessels or aircraft "obviously navigating with a view to supplying the combatant forces . . . with fuel or other provisions," can supply only their own needs in Danish ports or anchorages (Art. 14).—Ed.

neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden.⁵

ARTICLE 7. A neutral Power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunition, or, in general, of anything which could be of use to an army or fleet.⁶

ARTICLE 8. A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which had been adapted entirely or partly within the said jurisdiction for use in war.⁷

ARTICLE 9. A neutral Power must apply impartially to the two belligerents the conditions, restrictions, or prohibitions made by it in regard to the admission into its ports, roadsteads, or territorial waters, of belligerent war-ships or of their prizes.

Nevertheless, a neutral Power may forbid a belligerent vessel which has failed to conform to the orders and regulations made by it, or which has violated neutrality, to enter its ports or roadsteads.⁸

⁵ Havana Convention, ART. 15: "Of the acts of assistance coming from the neutral States, and the acts of commerce on the part of individuals, only the first are contrary to neutrality. ART. 16: The neutral State is forbidden: a) To deliver to the belligerent, directly or indirectly, or for any reason whatever, ships of war, munitions, or any other war material; b) To grant it loans, or to open credits for it during the duration of war; Credits that a neutral State may give to facilitate the sale or exportation of its food products and raw materials are not included in this prohibition." The exception of credits for food and raw materials is contrary to the principle of non-participation.—Ed.

⁶ See Note 5. Havana Convention, ART. 22: "Neutral States are not obligated to prevent the export or transit at the expense of any one of the belligerents of arms, munitions and in general of anything which may be useful to their military forces. Transit shall be permitted when, in the event of a war between two American nations, one of the belligerents is a mediterranean [i. e., landlocked] country, having no other means of supplying itself, provided the vital interests of the country through which transit is requested do not suffer by the granting thereof." Bolivia and Paraguay, parties to the Chaco Conflict of 1928, are the only States in North and South America which could benefit by the last sentence.—Ed.

⁷ See Note 4. The Stockholm Rules, Article 15, are similar, but add: "Any aircraft in a condition to commit an attack against a belligerent, or which carries apparatus or material the mounting or utilization of which would permit it to commit an attack, is forbidden to leave Danish [etc.] territory if there is reason to presume that it is destined to be employed against a belligerent Power. It is likewise forbidden to perform work on an aircraft in order to prepare its departure for the above-mentioned purpose."

The Havana Convention provides: "ART. 20. The merchantman supplied with fuel or other stores in a neutral State which repeatedly delivers the whole or part of its supplies to a belligerent vessel, shall not again receive stores and fuel in the same State. ART. 21. Should it be found that a merchantman flying a belligerent flag, by its preparations or other circumstances, can supply to warships of a State the stores which they need, the local authority may refuse it supplies or demand of the agent of the company a guaranty that the said ship will not aid or assist any belligerent vessel." Compare American "Neutrality Act" of 1939, § 192, below, Section 10.—Ed.

ARTICLE 10. The neutrality of a Power is not affected by the mere passage through its territorial waters of war-ships or prizes belonging to belligerents.⁸

ARTICLE 11. A neutral Power may allow belligerent war-ships to employ its licensed pilots.⁹

ARTICLE 12. In the absence of special provisions to the contrary in the legislation of a neutral Power, belligerent war-ships are not permitted to remain in the ports, roadsteads, or territorial waters of the said Power for more than twenty-four hours, except in the cases covered by the present Convention.¹⁰

ARTICLE 13. If a Power which has been informed of the outbreak of hostilities learns that a belligerent war-ship is in one of its ports or roadsteads, or in its territorial waters, it must notify the said ship to depart within twenty-four hours or within the time prescribed by local regulations.¹⁰

ARTICLE 14. A belligerent war-ship may not prolong its stay in a neutral port beyond the permissible time except on account of damage or stress of weather. It must depart as soon as the cause of the delay is at an end.

The regulations as to the question of the length of time which these vessels may remain in neutral ports, roadsteads, or waters, do not apply to war-ships devoted exclusively to religious, scientific, or philanthropic purposes.¹⁰

⁸ The Stockholm Rules apply equally to all belligerent warships. Access to certain ports and areas is prohibited entirely to belligerent warships. Navigation or sojourn in Danish (etc.) territorial waters by belligerent submarines armed for war is prohibited, with certain exceptions (Art. 2). Article 3 provides "1. Commerce destroyers [*corsaires*] shall not be permitted to enter Danish ports, nor to sojourn in Danish territorial waters. 2. Access to Danish ports or to Danish territorial waters is likewise prohibited to armed merchant ships of the belligerents, if the armament is destined to ends other than their own defense."

With regard to the admission of military aircraft into neutral territory, the Havana Convention provides in Article 14: "The airships of belligerents shall not fly above the territory or the territorial waters of neutrals if it is not in conformity with the regulations of the latter."

The Stockholm Rules provide in Article 8:

"1. Military aircraft of the belligerents, with the exception of aerial ambulances and aerial transports on board warships, shall not be admitted into Danish [etc.] territory, except when regulations to the contrary apply or may become applicable so far as certain spaces are concerned conformable to the general principles of international law.

"The said aircraft may traverse without unnecessary stoppage the exterior Danish territorial waters which connect the North Sea and the Baltic Sea by the Kattegat, the Great and Small Belt and the Sound, and the air-space thereabove. In the roadstead of Copenhagen and the air-space thereabove, all passage is prohibited. Under all circumstances, they will be required in passing to keep as far as possible from the coast.

"2. Aircraft transported on board belligerent warships are prohibited to leave these ships so long as they are in Danish territorial waters."—Ed.

⁹ The Stockholm Rules, Article 6, require belligerent warships in neutral territorial waters to use licensed pilots "in every case where recourse to the service of a pilot is obligatory, but otherwise they make use of the service of such a pilot only in case of distress to escape a peril of the sea."—Ed.

ARTICLE 15. In the absence of special provisions to the contrary in the legislation of a neutral Power, the maximum number of war-ships belonging to a belligerent which may be in one of the ports or roadsteads of that Power simultaneously shall be three.¹⁰

ARTICLE 16. When war-ships belonging to both belligerents are present simultaneously in a neutral port or roadstead, a period of not less than twenty-four hours must elapse between the departure of the ship belonging to one belligerent and the departure of the ship belonging to the other.

The order of departure is determined by the order of arrival, unless the ship which arrived first is so circumstanced that an extension of its stay is permissible.

A belligerent war-ship may not leave a neutral port or roadstead until twenty-four hours after the departure of a merchant ship flying the flag of its adversary.¹⁰

ARTICLE 17. In neutral ports and roadsteads belligerent war-ships may only carry out such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatsoever to their fighting force. The local authorities of the neutral Power shall decide what repairs are necessary, and these must be carried out with the least possible delay.¹¹

ARTICLE 18. Belligerent war-ships may not make use of neutral ports, roadsteads, or territorial waters for replenishing or increasing their supplies of war material or their armament, or for completing their crews.¹²

ARTICLE 19. Belligerent war-ships may only revictual in neutral ports or roadsteads to bring up their supplies to the peace standard.

Similarly these vessels may only ship sufficient fuel to enable them to reach the nearest port in their own country. They may, on the other hand, fill up their bunkers built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied.

If, in accordance with the law of the neutral Power, the ships are not supplied with coal within twenty-four hours of their arrival, the permissible duration of their stay is extended by twenty-four hours.¹²

ARTICLE 20. Belligerent war-ships which have shipped fuel in a port belonging to a neutral Power may not within the succeeding three months replenish their supply in a port of the same Power.¹²

¹⁰ Most of the general principles of Articles 12-16 of Hague Convention (XIII) of 1907 are repeated in Articles 5, 6, 7, and 8 of the Havana Convention, and in Article 4 of the Stockholm Rules.—Ed.

¹¹ The Havana Convention, Article 9, prescribes the same principle, and adds: "Damages which are found to have been produced by the enemy's fire shall in no case be repaired." Article 5 of the Stockholm Rules embodies the same principle, with the same addition.—Ed.

¹² The principles of the Hague Convention, Articles 18-20, are repeated in the Stockholm Rules, Article 5, and in Articles 10 and 11 of the Havana Convention. Article 12 of the latter, however, provides significantly as follows:

"Where the sojourn, supplying and provisioning of belligerent ships in the ports and

ARTICLE 21. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.¹³

ARTICLE 22. A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21.¹³

ARTICLE 23. A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a Prize Court. It may have the prize taken to another of its ports.

If the prize is convoyed by a war-ship, the prize crew may go on board the convoying ship.

If the prize is not under convoy, the prize crew are left at liberty.¹⁴

jurisdictional waters of neutrals are concerned, the provisions relative to ships of war shall apply equally:

"1. To ordinary auxiliary ships;

"2. To merchant ships transformed into warships, in accordance with Convention VII of The Hague of 1907.

"The neutral vessel shall be seized and in general subjected to the same treatment as enemy merchantmen: a) When taking a direct part in the hostilities; b) When at the orders or under the direction of an agent placed on board by an enemy government; c) When entirely freight-loaded by an enemy government; d) When actually and exclusively destined for transporting enemy troops or for the transmission of information on behalf of the enemy.

"In the cases dealt with in this article, merchandise belonging to the owner of the vessel or ship shall also be liable to seizure.

"3. To armed merchantmen."

The United States ratified subject to reservation of the provision relating to armed merchantmen.

Article 13 of the Havana Convention provides:

"Auxiliary ships of belligerents, converted anew into merchantmen, shall be admitted as such in neutral ports subject to the following conditions:

"1. That the transformed vessel has not violated the neutrality of the country where it arrives;

"2. That the transformation has been made in the ports or jurisdictional waters of the country to which the vessel belongs, or in the ports of its allies;

"3. That the transformation be genuine, namely that the vessel show neither in its crew nor in its equipment that it can serve the armed fleet of its country as an auxiliary, as it did before;

"4. That the Government of the country to which the ship belongs communicate to the States the names of auxiliary craft which have lost such character in order to recover that of merchantmen; and

"5. That the same Government obligate itself that said ships shall not again be used as auxiliaries to the war fleet."—Ed.

¹³ Substantially followed in the Havana Convention, Articles 17-18, and the Stockholm Rules, Article 7. See case of the *Appam*, § 179, below.—Ed.

¹⁴ The United States adhered to Hague Convention (XIII) of 1907 "subject to the reservation and exclusion of its Article 23." No similar provision for sequestration of prizes is to be found either in the Havana Convention or the Stockholm Rules.—Ed.

ARTICLE 24. If, notwithstanding the notification of the neutral Power, a belligerent ship of war does not leave a port where it is not entitled to remain, the neutral Power is entitled to take such measures as it considers necessary to render the ship incapable of taking the sea during the war, and the commanding officer of the ship must facilitate the execution of such measures.¹⁵

When a belligerent ship is detained by a neutral Power, the officers and crew are likewise detained.

The officers and crew thus detained may be left in the ship or kept either on another vessel or on land, and may be subjected to the measures of restriction which it may appear necessary to impose upon them. A sufficient number of men for looking after the vessel must, however, be always left on board.

The officers may be left at liberty on giving their word not to quit the neutral territory without permission.

ARTICLE 25. A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above articles occurring in its ports or roadsteads or in its waters.

ARTICLE 26. The exercise by a neutral Power of the rights laid down in the present Convention can under no circumstances be considered as an unfriendly act by one or other belligerent who has accepted the articles relating thereto.

ARTICLE 27. The contracting Powers shall communicate to each other in due course all laws, proclamations, and other enactments regulating in their respective countries the status of belligerent war-ships in their ports and waters, by means of a communication addressed to the Government of the Netherlands, and forwarded immediately by that Government to the other contracting Powers.

ARTICLE 28. The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention.

[Articles 29-33, dealing with ratifications, adhesions, the signatures, and so on, are omitted.]

§ 179. PRIZES IN NEUTRAL PORTS

The Steamship Appam

SUPREME COURT OF THE UNITED STATES, 1917

243 U. S. 124.

[Argument of counsel omitted.]

MR. JUSTICE DAY delivered the opinion of the court.

¹⁵ The same principle is found in Article 6 of the Havana Convention.—Ed.

These are appeals from the district court of the United States for the eastern district of Virginia, in two admiralty cases. No. 650 was brought by the British & African Steam Navigation Company, Limited, owner of the British steamship, *Appam*, to recover possession of that vessel. No. 722 was a suit by the master of the *Appam* to recover possession of the cargo. In each of the cases the decree was in favor of the libellant.

The facts are not in dispute, and from them it appears: That during the existence of the present war between Great Britain and Germany, on the 15th day of January, 1916, the steamship *Appam* was captured on the high seas by the German cruiser, *Moewe*. The *Appam* was a ship under the British flag, registered as an English vessel, and is a modern cargo and passenger steamship of 7,800 tons burden. At the time of her capture she was returning from the West Coast of Africa to Liverpool, carrying a general cargo of cocoa beans, palm oil, kernels, tin, maize, sixteen boxes of specie, and some other articles. At the West African port she took on 170 passengers, eight of whom were military prisoners of the English government. She had a crew of 160 or thereabouts, and carried a 3-pound gun at the stern. The *Appam* was brought to by a shot across her bows from the *Moewe*, when about a hundred yards away, and was boarded without resistance by an armed crew from the *Moewe*. . . .

At the time of the capture, the *Appam* was approximately distant 1,590 miles from Emden, the nearest German port; from the nearest available port, namely Punchello, in the Madeiras, 130 miles; from Liverpool, 1,450 miles; and from Hampton Roads, 3,051 miles. The *Appam* was found to be in first-class order, sea-worthy, with plenty of provisions, both when captured and at the time of her arrival in Hampton Roads. . . .

Upon arrival in Hampton Roads, Lieutenant Berg reported his arrival to the collector, and filed a copy of his instructions to bring the *Appam* into the nearest American port and there to lay up.

On February 2d, his Excellency, the German Ambassador, informed the State Department of the intention, under alleged treaty rights, to stay in an American port until further notice, and requested that the crew of the *Appam* be detained in the United States for the remainder of the war.

The prisoners brought in by the *Appam* were released by order of the American government.

On February 16th, and sixteen days after the arrival of the *Appam* in Hampton Roads, the owner of the *Appam* filed the libel in case No. 650, to which answer was filed on March 3d. On March 7th, by leave of court, an amended libel was filed, by which the libellant sought to recover the *Appam* upon the claim that holding and detaining the vessel in American waters was in violation of the law of nations and the laws of the United States and of the neutrality of the United States. The answer of the re-

spondents to the amended libel alleged that the *Appam* was brought in as a prize by a prize master, in reliance upon the Treaty of 1799 between the United States and Prussia; that by the general principles of international law the prize master was entitled to bring his ship into the neutral port under these circumstances, and that the length of stay was not a matter for judicial determination; and that proceedings had been instituted in a proper prize court of competent jurisdiction in Germany for the condemnation of the *Appam* as a prize of war; and averred that the American court had no jurisdiction. . . .

From the facts which we have stated, we think the decisive questions resolve themselves into three: First, was the use of an American port, under the circumstances shown, a breach of this Nation's neutrality under the principles of international law? Second, was such use of an American port justified by the existing treaties between the German government and our own? Third, was there jurisdiction and right to condemn the *Appam* and her cargo in a court of admiralty of the United States?

It is familiar international law that the usual course after the capture of the *Appam* would have been to take her into a German port, where a prize court of that nation might have adjudicated her status, and, if it so determined, condemned the vessel as a prize of war. Instead of that, the vessel was neither taken to a German port, nor to the nearest port accessible of a neutral power, but was ordered to, and did, proceed over a distance of more than 3,000 miles, with a view to laying up the captured ship in an American port.

It was not the purpose to bring the vessel here within the privileges universally recognized in international law, i. e., for necessary fuel or provisions, or because of stress of weather or necessity of repairs, and to leave as soon as the cause of such entry was satisfied or removed. The purpose for which the *Appam* was brought to Hampton Roads, and the character of the ship, are emphasized in the order which we have quoted, to take her to an American port and there lay her up, and in a note from his Excellency, the German Ambassador, to the Secretary of State, in which the right was claimed to keep the vessel in an American port until further notice (Diplomatic Correspondence with Belligerent Governments Relating to Neutral Rights and Duties, Department of State, European War No. 3, page 331), and a further communication from the German Ambassador, forwarding a memorandum of a telegram from the German government concerning the *Appam*, (*Idem*, p. 333), in which it was stated:

"*Appam* is not an auxiliary cruiser, but a prize. Therefore she must be dealt with according to article 19 of Prusso-American Treaty of 1799. Article 21 of Hague Convention concerning neutrality at sea is not applicable, as this convention was not ratified by England and is therefore not binding

in present war according to article 28. The above-mentioned article 19 authorizes a prize ship to remain in American ports as long as she pleases. Neither the ship nor the prize crew can therefore be interned nor can there be question of turning the prize over to English."

In view of these facts, and this attitude of the Imperial Government of Germany, it is manifest that the *Appam* was not brought here in any other character than as a prize, captured at sea by a cruiser of the German navy, and that the right to keep her here, as shown in the attitude of the German Government and in answer to the libel, was rested principally upon the Prussian-American Treaty of 1799.

The principles of international law recognized by this Government, leaving the treaty aside, will not permit the ports of the United States to be thus used by belligerents. If such use were permitted, it would constitute of the ports of a neutral country harbors of safety into which prizes, captured by one of the belligerents, might be safely brought and indefinitely kept.

From the beginning of its history this country has been careful to maintain a neutral position between warring governments, and not to allow the use of its ports in violation of the obligations of neutrality; nor to permit such use beyond the necessities arising from the perils of the seas or the necessities of such vessels as to sea-worthiness, provisions, and supplies. Such usage has the sanction of international law, Dana's Note to Wheaton on International Law, 1866, 8th Am. Ed. § 391, and accords with our own practice. Moore's Digest of International Law, vol. 7, 936, 937, 938. . . .

This policy of the American Government was emphasized in its attitude at the Hague Conference of 1907. Article 21 of the Hague Treaty provides:

"A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

"It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew."

Article 22 provides:

"A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in article 21."

To these articles, adherence was given by Belgium, France, Austria-Hungary, Germany, the United States, and a number of other nations. They were not ratified by the British Government. This Government [United States] refused to adhere to article 23, which provides:

"A neutral Power may allow prizes to enter its ports and roadsteads,

whether under convoy or not, when they are brought there to be sequestered pending the decision of a Prize Court. It may have the prize taken to another of its ports.

"If the prize is convoyed by a war-ship, the prize crew may go on board the convoying ship.

"If the prize is not under convoy, the prize crew are left at liberty."

And in the proclamation of the convention the President recited the resolution of the Senate adhering to it, subject to "the reservation and exclusion of its article 23, and with the understanding that the last clause of article 3 of the said Convention implies the duty of a neutral power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction." 36 Stat., Pt. II, p. 2438.

While this treaty may not be of binding obligation, owing to lack of ratification, it is very persuasive as showing the attitude of the American Government when the question is one of international law; from which it appears clearly that prizes could only be brought into our ports upon general principles recognized in international law, on account of unseaworthiness, stress of weather, or want of fuel or provisions, and we refused to recognize the principle that prizes might enter our ports and roadsteads, whether under convoy or not, to be sequestered pending the decision of a prize court. From the history of the conference it appears that the reason for the attitude of the American delegates in refusing to accept article 23 was that thereby a neutral might be involved in participation in the war to the extent of giving asylum to a prize which the belligerent might not be able to conduct to a home port. See Scott, *Peace Conferences, 1899-1907*, vol. II, p. 237 *et seq.*

Much stress is laid upon the failure of this Government to proclaim that its ports were not open to the reception of captured prizes, and it is argued that, having failed to interdict the entrance of prizes into our ports, permission to thus enter must be assumed. But, whatever privilege might arise from this circumstance, it would not warrant the attempted use of one of our ports as a place in which to store prizes indefinitely, and certainly not where no means of taking them out are shown except by the augmentation of her crew, which would be a clear violation of established rules of neutrality.

As to the contention on behalf of the appellants that article XIX of the Treaty of 1799 justifies bringing in and keeping the *Appam* in an American port, in the situation which we have outlined, it appears that, in response to a note from his Excellency, the German Ambassador, making that contention, the American Secretary of State, considering the treaty, announced a different conclusion (*Diplomatic Correspondence with Bellig-*

erent Governments, *supra*, pages 335 *et seq.*); and we think this view is justified by a consideration of the terms of the treaty. Article XIX of the Treaty of 1799, using the translation adopted by the American State Department, reads as follows:

"The vessels of war, public and private of both parties, shall carry (*conduire*) freely, wheresoever they please, the vessels and effects taken (*pris*) from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes (*prises*) be arrested, searched or put under legal process, when they come to and enter the ports of the other party, but may freely be carried (*conduites*) out again at any time by their captors (*le vaisseau preneur*) to the places expressed in their commissions, which the commanding officer of such vessel (*le dit vaisseau*) shall be obliged to show. But conformably to the treaties existing between the United States and Great Britain, no vessel (*vaisseau*) that shall have made a prize (*prise*) upon British subjects shall have a right to shelter in the ports of the United States, but if (*il est*) forced therein by tempests, or any other danger, or accident of the sea, they (*il sera*) shall be obliged to depart as soon as possible." (The provision concerning the treaties between the United States and Great Britain is no longer in force, having been omitted by the Treaty of 1828. See *Compilation of Treaties in Force*, 1904, pp. 641 and 646.

We think an analysis of this article makes manifest that the permission granted is to vessels of war and their prizes, which are not to be arrested, searched, or put under legal process when they come into the ports of the high contracting parties, to the end that they may be freely carried out by their captors to the places expressed in their commissions, which the commanding officer is obliged to show. When the *Appam* came into the American harbor she was not in charge of a vessel of war of the German Empire. She was a merchant vessel, captured on the high seas and sent into the American port with the intention of being kept there indefinitely, and without any means of leaving that port for another, as contemplated in the treaty, and required to be shown in the commission of the vessel bringing in the prize. Certainly such use of a neutral port is very far from that contemplated by a treaty which made provision only for temporary asylum for certain purposes, and cannot be held to imply as intention to make of an American port a harbor of refuge for captured prizes of a belligerent government. We cannot avoid the conclusion that in thus making use of an American port there was a clear breach of the neutral rights of this Government, as recognized under principles of international law governing the obligations of neutrals, and that such use of one of our ports was in no wise sanctioned by the Treaty of 1799.

It remains to inquire whether there was jurisdiction and authority in an

admiralty court of the United States, under these circumstances, to order restoration to an individual owner of the vessel and cargo.

The earliest authority upon this subject in the decisions of this court is found in the case of *Glass v. The Sloop Betsy*, 3 Dall. 6, decided in 1794, wherein it appeared that the commander of the French privateer, *The Citizen Genet*, captured as a prize on the high seas the sloop *Betsy*, and sent the vessel into Baltimore, where the owners of the sloop and cargo filed a libel in the district court of Maryland, claiming restitution because the vessel belonged to subjects of the King of Sweden, a neutral power, and the cargo was owned jointly by Swedes and Americans. The district court denied jurisdiction, the circuit court affirmed the decree, and an appeal was prosecuted to this court. The unanimous opinion was announced by Mr. Chief Justice Jay, holding that the district courts of the United States possessed the powers of courts of admiralty, whether sitting as an instance or as a prize court, and sustained the jurisdiction of the district court of Maryland, and held that that court was competent to inquire into and decide whether restitution should be made to the complainants conformably to the laws of nations and the treaties and laws of the United States.

The question came again before this court in the case of *The Santissima Trinidad*, decided in 1822, 7 Wheat. 283. In that case it was held that an illegal capture would be invested with the character of a tort, and that the original owners were entitled to restitution when the property was brought within our jurisdiction. . . .

In the subsequent cases in this court this doctrine has not been departed from. *L'Invincible*, 1 Wheat. 238, 258; *The Estrella*, 4 Wheat. 298, 308-311; *La Amistad de Rues*, 5 Wheat. 385, 390.

It is insisted that these cases involve illegal captures at sea, or violations of neutral obligation, not arising because of the use of a port by sending in a captured vessel and keeping her there in violation of our rights as a neutral. But we are at a loss to see any difference in principle between such cases and breaches of neutrality of the character here involved in undertaking to make of an American port a depository of captured vessels with a view to keeping them there indefinitely. Nor can we consent to the insistence of counsel for appellant that the Prize Court of the German Empire has exclusive jurisdiction to determine the fate of the *Appam* as lawful prize. The vessel was in an American port, and, under our practice, within the jurisdiction and possession of the District Court, which had assumed to determine the alleged violation of neutral rights, with power to dispose of the vessel accordingly. The foreign tribunal, under such circumstances, could not oust the jurisdiction of the local court and thereby defeat its judgment. *The Santissima Trinidad*, *supra*, p. 355.

Were the rule otherwise than this court has frequently declared it to be,

our ports might be filled, in case of a general war such as is now in progress between the European countries, with captured prizes of one or the other of the belligerents, in utter violation of the principles of neutral obligation which have controlled this country from the beginning.

The violation of American neutrality is the basis of jurisdiction, and the admiralty courts may order restitution for a violation of such neutrality. In each case the jurisdiction and order rests upon the authority of the courts of the United States to make restitution to private owners for violations of neutrality where offending vessels are within our jurisdiction, thus vindicating our rights and obligations as a neutral people.

It follows that the decree in each case must be

Affirmed.

§ 179a. THE NATURE AND FUNCTIONS OF PRIZE COURTS

The Zamora

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN, 1916

Law Reports [1916] 2 A. C. 77.

APPEAL from an order of the Prize Court (England). . . .

LORD PARKER OF WADDINGTON: On April 8, 1915, the *Zamora*, a Swedish steamship bound from New York to Stockholm with a cargo of grain and copper, was stopped by one of His Majesty's cruisers between the Faroe and Shetland Islands and taken for purposes of search first to the Orkney Islands and then to Barrow-in-Furness. She was seized as prize in the latter port on April 19, 1915, and in due course placed in the custody of the marshal of the Prize Court. . . .

On May 14, 1915, a writ was issued by His Majesty's Procurator-General claiming confiscation of both vessel and cargo, and on June 14, 1915, the President [of the Prize Court], at the instance of the Procurator-General, made an order under Order XXIX., r. 1, of the Prize Court Rules giving leave to the War Department to requisition the copper, but subject to an undertaking being given in accordance with the provisions of order XXIX., r. 5. This appeal is from the President's order of June 14, 1915. . . .

The Prize Court Rules derive their force from Orders of His Majesty in Council. These Orders are expressed to be made under the powers vested in His Majesty by virtue of the Prize Court Act, 1894, or otherwise. The Act of 1894 confers on the King in Council power to make rules as to the procedure and practice of the Prize Courts. So far, therefore, as the Prize Court Rules relate to procedure and practice they have statutory force and are, undoubtedly, binding. But Order XXIX., r. 1, construed as an imperative direction to the judge is not merely a rule of procedure or practice. . . .

If, therefore, Order XXIX., rule 1, construed as an imperative direction be binding, it must be by virtue of some power vested in the King in Council otherwise than by virtue of the Act of 1894. It was contended by the Attorney-General that the King in Council has such a power by virtue of the Royal prerogative, and their Lordships will proceed to consider this contention.

The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our Constitution. It is true that, under a number of modern statutes, various branches of the Executive have power to make rules having the force of statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of Common Law or Equity. It is, however, suggested that the manner in which Prize Courts in this country are appointed and the nature of their jurisdiction differentiate them in this respect from other Courts.

Prior to the Naval Prize Act, 1864, jurisdiction in matters of prize was exercised by the High Court of Admiralty, by virtue of a commission issued by the Crown under the Great Seal at the commencement of each war. The commission no doubt owed its validity to the prerogative, but it cannot on that account be properly inferred that the prerogative extended to prescribing or altering the law to be administered from time to time under the jurisdiction thereby conferred. The Courts of Common Law and Equity in like manner originated in an exercise of the prerogative. The form of commission conferring jurisdiction in prize on the Court of Admiralty was always substantially the same. Their Lordships will take that quoted by Lord Mansfield in *Lindo v. Rodney* (1782), 2 Doug. 612, n., 614, n., as an example. It required and authorized the Court of Admiralty "to proceed upon any and all manner of captures, seizures, prizes, and reprisals, of all ships and goods, that are, or shall be, taken; and to hear and determine, according to the course of the Admiralty, and the law of nations." If these words be considered, there appear to be two points requiring notice, and each of them, so far from suggesting any reason why the prerogative should extend to prescribing or altering the law to be administered by a Court of Prize, suggests strong grounds why it should not.

In the first place, all those matters upon which the Court is authorized to proceed are, or arise out of, acts done by the sovereign power in right of war. It follows that the King must, directly or indirectly, be a party to all proceedings in a Court of Prize. In such a Court his position is in fact the same as in the ordinary Courts of the realm upon a petition of right which

has been duly fiated. Rights based on sovereignty are waived and the Crown for most purposes accepts the position of an ordinary litigant. A Prize Court must of course deal judicially with all questions which come before it for determination, and it would be impossible for it to act judicially if it were bound to take its orders from one of the parties to the proceedings.

In the second place, the law which the Prize Court is to administer is not the national or, as it is sometimes called, the municipal law, but the law of nations—in other words, international law. Of course, the Prize Court is a municipal Court, and its decrees and orders owe their validity to municipal law. The law it enforces may therefore, in one sense, be considered a branch of municipal law. Nevertheless, this distinction between municipal and international law is well defined. A Court which administers municipal law is bound by and gives effect to the law as laid down by the sovereign State which calls it into being. It need inquire only what that law is, but a Court which administers international law must ascertain and give effect to a law which is not laid down by any particular State, but originates in the practice and usage long observed by civilized nations in their relations towards each other or in express international agreement. It is obvious that, if and so far as a Court of Prize in this country is bound by and gives effect to Orders of the King in Council purporting to prescribe or alter the international law, it is administering not international but municipal law; for an exercise of the prerogative cannot impose legal obligation on any one outside the King's dominions who is not the King's subject. If an Order in Council were binding on the Prize Court, such Court might be compelled to act contrary to the express terms of the commission from which it derived its jurisdiction.

There is yet another consideration which points to the same conclusion. The acts of a belligerent Power in right of war are not justiciable in its own Courts unless such Power, as a matter of grace, submit to their jurisdiction. Still less are such acts justiciable in the Courts of any other Power. As is said by Story J. in the case of *The Invincible* [1814], 2 Gall. 28, 44, "the acts done under the authority of one Sovereign can never be subject to the revision of the tribunals of another Sovereign; and the parties to such acts are not responsible therefor in their private capacities." It follows that but for the existence of Courts of Prize no one aggrieved by the acts of a belligerent Power in times of war could obtain redress otherwise than through diplomatic channels and at the risk of disturbing international amity. An appropriate remedy is, however, provided by the fact that, according to international law, every belligerent Power must appoint and submit to the jurisdiction of a Prize Court to which any person aggrieved by its acts has access, and which administers international as opposed to municipal law—a law which is theoretically the same, whether

the Court which administers it is constituted under the municipal law of the belligerent Power or of the Sovereign of the person aggrieved, and is equally binding on both parties to the litigation. It has long been well settled by diplomatic usage that, in view of the remedy thus afforded, a neutral aggrieved by any act of a belligerent Power cognizable in a Court of Prize ought, before resorting to diplomatic intervention, to exhaust his remedies in the Prize Courts of the belligerent Power. A case for such intervention arises only if the decisions of those Courts are such as to amount to a gross miscarriage of justice. It is obvious, however, that the reasons for this rule of diplomacy would entirely vanish if a Court of Prize, while nominally administering a law of international obligation, were in reality acting under the direction of the Executive of the belligerent Power.

It cannot, of course, be disputed that a Prize Court, like any other Court, is bound by the legislative enactments of its own sovereign State. A British Prize Court would certainly be bound by Acts of the Imperial Legislature. But it is none the less true that if the Imperial Legislature passed an Act the provisions of which were inconsistent with the law of nations, the Prize Court in giving effect to such provisions would no longer be administering international law. It would in the field covered by such provisions be deprived of its proper function as a Prize Court. Even if the provisions of the Act were merely declaratory of the international law, the authority of the Court as an interpreter of the law of nations would be thereby materially weakened, for no one could say whether its decisions were based on a due consideration of international obligations, or on the binding nature of the Act itself. The fact, however, that the Prize Courts in this country would be bound by Acts of the Imperial Legislature affords no ground for arguing that they are bound by the executive orders of the King in Council.

In connection with the foregoing considerations, their Lordships attach considerable importance to the Report dated January 18, 1753, of the Committee appointed by His Britannic Majesty to reply to the complaints of Frederick II. of Prussia as to certain captures of Prussian vessels made by British ships during the war with France and Spain, which broke out in 1744. By way of reprisals for these captures the Prussian King had suspended the payment of interest on the Silesian Loan. The Report, which derives additional authority from the fact that it was signed by Mr. William Murray, then Solicitor-General, afterwards Lord Mansfield, contains a valuable statement as to the law administered by Courts of Prize. This is stated to be the law of nations, modified in some cases by particular treaties. "If," says the Report, "a subject of the King of Prussia is injured by, or has a demand upon any person here, he ought to apply to your Majesty's Courts of justice, which are equally open and indifferent to foreigner or

native; so, vice versa, if a subject here is wronged by a person living in the dominions of His Prussian Majesty, he ought to apply for redress in the King of Prussia's Courts of justice. If the matter of complaint be a capture at sea during war, and the question relative to prize, he ought to apply to the judicatures established to try these questions. The law of nations, founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in case of violent injuries directed or supported by the State, and justice absolutely denied in *re minime dubia* by all the tribunals, and afterwards by the Prince. Where the judges are left free, and give sentence according to their conscience, though it should be erroneous, that would be no ground for reprisals. Upon doubtful questions different men think and judge differently; and all a friend can desire is, that justice should be impartially administered to him, as it is to the subjects of that Prince in whose Courts the matter is tried." The Report further points out that in England "the Crown never interferes with the course of justice. No order or intimation is ever given to any judge." It also contains the following statement: "All captures at sea, as prize, in time of war, must be judged of in a Court of Admiralty, according to the law of nations and particular treaties, where there are any. There never existed a case where a Court, judging according to the laws of England only, took cognizance of prize . . . it never was imagined that the property of a foreign subject, taken as prize on the high seas, could be affected by laws peculiar to England." See *Collectanea Juridica*, vol. 1, pp. 138, 147, 152. This Report is, in their Lordships' opinion, conclusive that in 1753 any notion of a Prize Court being bound by the executive orders of the Crown, or having to administer municipal as opposed to international law, was contrary to the best legal opinion of the day.

The Attorney-General was unable to cite any case in which an Order of the King in Council had as to matters of law been held to be binding on a Court of Prize. He relied chiefly on the judgment of Lord Stowell in the case of *The Fox* [1811], Edw. 311; 2 Eng. P. C. 61. The actual decision in that case was to the effect that there was nothing inconsistent with the law of nations in certain Orders in Council made by way of reprisals for the Berlin and Milan Decrees, though if there had been no case for reprisals the Orders would not have been justified by international law. . . .

The judgment of Lord Stowell contains, however, a remarkable passage quoted in full in the Court below, which refers to the King in Council possessing "legislative rights" over a Court of Prize analogous to those possessed by Parliament over the Courts of common law. At most this amounts to a dictum, and in their Lordships' opinion, with all due respect to so great an authority, the dictum is erroneous. It is, in fact, quite irreconcilable with the principles enunciated by Lord Stowell himself. For example in *The*

Maria, 1 C. Rob. 340, 350; 1 Eng. P. C. 152, 153, a Swedish ship, his judgment contains the following passage: "The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations: but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm: to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character." It is impossible to reconcile this passage with the proposition that the Prize Court is to take its law from Orders in Council. . . .

There are two further points requiring notice in this part of the case. The first arises on the argument addressed to the Board by the Solicitor-General. It may be, he said, that the Court would not be bound by an Order in Council which is manifestly contrary to the established rules of international law, but there are regions in which such law is imperfectly ascertained and defined; and, when this is so, it would not be unreasonable to hold that the Court should subordinate its own opinion to the directions of the Executive. This argument is open to the same objection as the argument of the Attorney-General. If the Court is to decide judicially in accordance with what it conceives to be the law of nations, it cannot, even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfil its function as a Prize Court and justify the confidence which other nations have hitherto placed in its decisions.

The second point requiring notice is this. It does not follow that, because Orders in Council cannot prescribe or alter the law to be administered by the Prize Court, such Court will ignore them entirely. On the contrary, it will act on them in every case in which they amount to a mitigation of the Crown rights in favour of the enemy or neutral, as the case may be. . . . Further, the Prize Court will take judicial notice of every Order in Council material to the consideration of matters with which it has to deal, and will give the utmost weight and importance to every such Order short of treating it as an authoritative and binding declaration of law. . . . An Order authorizing reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, and will have due weight as showing what, in the opinion of His Majesty's advisers, are the best or only means of meeting the emergency; but this will not preclude the right of any party aggrieved to contend, or the right of the Court to hold, that these means are unlawful. . . . Further, it cannot be

assumed, until there be a decision of the Prize Court to that effect, that any executive order is contrary to law, and all such orders, if acquiesced in and not declared to be illegal, will, in the course of time, be themselves evidence by which international law and usage may be established. . . .

On this part of the case, therefore, their Lordships hold that Order XXIX, r. 1, of the Prize Court Rules, construed as an imperative direction to the Court, is not binding. . . . Their Lordships will humbly advise His Majesty accordingly. . . .

§ 180. THE DECLARATION OF PARIS, 1856

It can be said that up to the general acceptance of the rules of the Declaration of Paris (1856), there were no generally accepted rules of international law relating to the status of private property at sea. Prior to the time of the *Consolato del Mare* (fourteenth century), an influential collection of maritime usages enforced in the Mediterranean area, belligerents often seized neutral property found on enemy ships, and neutral ships when found carrying enemy goods. The rule of the *Consolato* was that a belligerent might seize either enemy ships or enemy goods. If, however, neutral goods were found on an enemy ship, they must be restored to the neutral owners; and if enemy goods were found on neutral ships, while the goods might be confiscated, the ships must be restored to the neutral owners. This clear-cut rule, however, was never universally adopted, though it was adhered to by Great Britain, the greatest maritime Power, to the beginning of the Crimean War in 1854. France, however, in Ordinances of 1543, 1584, and 1681, and Spain in 1718, adopted the rule that both neutral goods found on enemy ships and neutral ships on which enemy goods were found, might be confiscated. The situation was made more complex by the fact that privateering (the issuance of commissions by belligerents authorizing merchant vessels to prey upon enemy commerce) was regarded as lawful, and by the prevailing doubt as to what constituted a valid blockade empowering belligerents to seize neutral vessels. During the Napoleonic Wars both Great Britain and France had attempted to establish "paper blockades," that is, to bar access of neutral vessels to long stretches of enemy coast without any attempt to enforce such "blockades" with navies capable of doing so.

The Declaration of Paris of 1856, printed below, reflected the conclusion reached during the Crimean War that some settlement of these long-disputed questions was necessary. The signatory States (Austria, France, Great Britain, Prussia, Russia, Sardinia, and Turkey) engaged themselves to invite the non-signatory Powers to accede to it; and as a result, most of the other States did so. A few States, including the United States, did not; but in practice, up to the World War of 1914, even these States observed the principles of the Declaration. The United States did not accede because in its judgment the Declaration should have exempted even the private property of belligerents (except contraband) from capture, if privateering was to be abolished. As early as 1861, however, the United States indicated its willingness to accede to the Declaration, but France and Great Britain insisted that its principles should not apply in the American Civil War, and the negotiations were terminated. With the outbreak of the Spanish-American War, the American Secretary of State on April 22, 1898, an-

nounced that the United States would pursue policies which followed the principles of the Declaration. It does not seem too much to say, therefore, that in 1914 the Declaration embodied generally accepted principles of international law.

During the wars of 1914-1918, though all the belligerents had in some form accepted the rules, the effects which neutrals had intended to secure were generally avoided by (1) extension of contraband lists, so that most important articles of commerce were claimed to be within the *exceptions* to the second and third principles of the Declaration (see § 181, page 899, n. 5); (2) extension of the idea of enemy destination, so that contraband articles bound even for neutral ports were confiscated if evidence of new types showed an *ultimate* enemy destination (see § 185); (3) rules requiring neutral vessels to "put in" at belligerent ports for examination (see § 186 below).

Declaration Respecting Maritime Law (Declaration of Paris)

SIGNED AT PARIS, APRIL 16, 1856; RATIFICATIONS EXCHANGED AT PARIS,
APRIL 29, 1856¹

2 Hertslet, *Map of Europe by Treaty*, 1282.

The Plenipotentiaries who signed the Treaty of Paris of the thirtieth of March, one thousand eight hundred and fifty-six, assembled in conference, Considering:

¹ Jessup and Deak give the following information concerning ratifications (1937):

"This declaration was signed originally by Austria, France, Great Britain, Prussia, Russia, Sardinia, and Turkey.

"According to available information, the following states adhered subsequently to the declaration: Anhalt-Dessau-Coethen, Argentine Confederation, Bavaria, Belgium, Brazil, Bremen, Brunswick, Denmark, Ecuador, Frankfurt, Germanic Confederation, Greece, Guatemala, Hamburg, Hanover, Haiti, Hesse-Cassel, Hesse-Darmstadt, Lübeck, Mecklenburg-Schwerin, Mecklenburg-Strelitz, Modena, Nassau, Netherlands, New Granada, Oldenburg, Parina, Peru, Portugal, Roman States, Saxe-Altenburg, Saxe-Coburg-Gotha, Saxe-Meiningen, Saxe-Weimar, Saxony, Sicily, Sweden and Norway, Switzerland, Tuscany, Würtemberg.

"Uruguay has given its assent to the four principles of the declaration, subject to ratification by the legislature. Spain and Mexico, without acceding to the declaration, on account of the first point, have replied that they approve the other three principles.

"The United States expressed willingness to adhere provided that the abolition of privateering is amended to the effect that private property of belligerent nationals shall be exempt from capture on the high seas. For the diplomatic correspondence relating to the position taken by the United States see 7 Moore's *Digest of International Law*, page 563 ff.

"The four principles contained in the Declaration of Paris have been incorporated in the following bipartite treaties:

France and Salvador, January 2, 1858, article 19.

Italy and Salvador, October 27, 1860, article 19.

France and Peru, March 9, 1861, article 19.

Italy and Sandwich Islands, February 27, 1864, additional article to treaty of July 22, 1863.

Italy and Honduras, December 31, 1868, article 12.

Italy and Guatemala, December 31, 1868, article 12.

Prussia and Salvador, June 13, 1870, article 20.

Brazil and Paraguay, January 9, 1872, article 16.

Italy and Peru, December 23, 1874, article 11.

Germany and Costa Rica, May 18, 1875, article 23.

Argentina and Paraguay, February 3, 1876, article 23.

Mexico and Sweden and Norway, December 15, 1885, article 1 of protocol to treaty of July 29, 1885."

—*Treaty Provisions Defining Neutral Rights and Duties*, Senate Document No. 24, 75th Congress, 1st Session, 100-101.—Ed.

That maritime law in time of war has long been the subject of deplorable disputes;

That the uncertainty of the law and of the duties in such a matter gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties, and even conflicts;

That it is consequently advantageous to establish a uniform doctrine on so important a point;

That the plenipotentiaries assembled in congress at Paris cannot better respond to the intentions by which their Governments are animated, than by seeking to introduce into international relations fixed principles in this respect;

The above-mentioned plenipotentiaries, being duly authorised, resolved to concert among themselves as to the means of attaining this object; and, having come to an agreement, have adopted the following solemn declaration:

1. Privateering is, and remains abolished;
2. The neutral flag covers enemy's goods, with the exception of contraband of war;
3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag;
4. Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

The Governments of the undersigned plenipotentiaries engage to bring the present declaration to the knowledge of the states which have not taken part in the congress of Paris, and to invite them to accede to it.

Convinced that the maxims which they now proclaim cannot but be received with gratitude by the whole world, the undersigned plenipotentiaries doubt not that the efforts of their Governments to obtain the general adoption thereof, will be crowned with full success.

The present declaration is not and shall not be binding, except between those Powers who have acceded, or shall accede, to it.

**§ 181. THE UNRATIFIED CODIFICATION OF NEUTRAL
RIGHTS AND DUTIES (1909)
(BLOCKADE, CONTRABAND, UNNEUTRAL SERVICE, DE-
STRUCTION OF NEUTRAL PRIZES, TRANSFER
OF FLAG, ENEMY CHARACTER, CONVOY,
RESISTANCE TO SEARCH)**

Convention (XII) of the 1907 Hague Conference contained an elaborate plan for the establishment of an International Prize Court which should have

jurisdiction of an appellate character over the decisions rendered during a war by national prize courts. This Convention, however, never came into force. In the controversy over the ratification of the Convention there were two leading objections to the Court. The first was the impossibility at that time of formulating a method of constituting the Court in a manner that would be satisfactory both to the great maritime powers with most at stake, and to the smaller nations who insisted on the principle of equality of representation. The second was the feeling that the rights of belligerents and neutrals were not sufficiently defined by existing international law to permit reasonable certainty as to what the judgments of the Court would be.

In December, 1908, the delegates of the principal Powers met in a Naval Conference at London to make a multilateral treaty stating the rights of belligerents and neutrals in naval war, so that there might be no doubt of what law the projected international Prize Court would apply. By a process of mutual give-and-take the delegates were successful in drawing up a truly remarkable code of rules—the *Declaration of London*, of February 26, 1909. The Declaration was signed by Germany, the United States, Austria-Hungary, Spain, France, Great Britain, Italy, Japan, the Netherlands, and Russia. Had it been ratified, and the International Prize Court to administer it been established, many of the controversies over neutral rights which led neutrals into the World War of 1914 might have been left to relatively impartial adjudication. But the Declaration never came into force. The British House of Lords voted adversely in December, 1911; this action by the most important maritime power at that time so prejudiced the future of the Declaration that other States were reluctant to ratify. The Senate of the United States advised and consented to its ratification on April 24, 1912, but the President did not ratify it. The Declaration thus remained unratified at the outbreak of war in 1914.

On August 6, 1914, the United States proposed to the principal belligerents that they apply the Declaration during the existing war. Austria-Hungary and Germany replied that they would observe the rules of the Declaration if their enemies would do likewise. The British Government replied that it would "adopt generally the rules subject to certain modifications and additions which they judge indispensable to the efficient conduct of their naval operations," and France and Russia followed this lead. Inasmuch as Article 65 of the Declaration provided that the Declaration's provisions "form an indivisible whole," thus precluding signatories from having the benefit of provisions advantageous to them while escaping the consequences of provisions detrimental to them, the United States found the latter answers unsatisfactory. It withdrew its proposal on October 22, 1914, and announced that the American Government would "insist that the rights and duties of the United States and of its citizens in the present war be defined by the existing rules of international law and the treaties of the United States," irrespective of the provisions of the Declaration of London. Nevertheless, an Order in Council of October 29, 1914, adopted and put in force the provisions of the Declaration, "subject to the exclusion of the lists of contraband and non-contraband," and certain other modifications. Great Britain and her Allies did not formally abandon the Declaration until July 7, 1916, although the "modifications and additions" which had been foreshadowed in the British reply vindicated the cautious attitude of the United States.

Declaration of London, February 26, 1909

Text from *Foreign Relations of the United States*, 1909, pp. 318-333.

DECLARATION CONCERNING THE LAWS OF NAVAL WAR ¹

His Majesty the German Emperor, King of Prussia; the President of the United States of America; His Majesty the Emperor of Austria, King of Bohemia, &c., and Apostolic King of Hungary; His Majesty the King of Spain; the President of the French Republic; His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India; His Majesty the King of Italy; His Majesty the Emperor of Japan; Her Majesty the Queen of the Netherlands; His Majesty the Emperor of All the Russias;

Considering the invitation which the British Government has given to various Powers to meet in conference in order to determine together as to what are the generally recognized rules of international law within the meaning of Article 7 of the Convention of 18th October, 1907, relative to the establishment of an International Prize Court;

Recognizing all the advantages which, in the unfortunate event of a naval war an agreement as to said rules would present, both as regards peaceful commerce, and as regards the belligerents and their diplomatic relations with neutral Governments;

Considering that the general principles of international law are often in their practical application the subject of divergent procedure;

Animated by the desire to insure henceforward a greater measure of uniformity in this respect;

Hoping that a work so important to the common welfare will meet with general approval;

Have appointed as their Plenipotentiaries, that is to say:

[Names of Plenipotentiaries are omitted.]

Who, after having communicated their full powers found in good and due form, have agreed to make the present Declaration:

PRELIMINARY PROVISION

The Signatory Powers are agreed that the rules contained in the following chapters correspond in substance with the generally recognized principles of international law.

CHAPTER I. BLOCKADE IN TIME OF WAR ²

ARTICLE I. A blockade must be limited to the ports and coasts belonging to or occupied by the enemy.

¹ The official text of the Declaration is in French.—ED.

² Compare generally the following provisions with § 180, above, and §§ 182, 183, below. For aerial blockade, see § 159, page 797.

The measures taken by the belligerents 1914-1918 in the principal theater of naval

ART. 2. In accordance with the Declaration of Paris, 1856, a blockade, in order to be binding, must be effective—that is to say, it must be maintained by a force sufficient really to prevent access to the enemy coast.

ART. 3. The question whether a blockade is effective is a question of fact.

ART. 4. A blockade is not regarded as raised if by bad weather the blockading forces are temporarily driven off.

ART. 5. A blockade must be applied impartially to the ships of all nations.

ART. 6. The commander of a blockading force may grant to a war-ship permission to enter, and subsequently to leave, a blockaded port.

ART. 7. In circumstances of distress, acknowledged by an authority of the blockading forces, a neutral vessel may enter a place under blockade and subsequently leave it, provided that she has neither discharged nor shipped any cargo.

ART. 8. A blockade, in order to be binding must be declared in accordance with Article 9, and notified in accordance with Articles 11 and 16.

operations did not constitute "blockades" in the technical sense of the Declaration of London, though both the Allied measures aimed at restricting enemy commerce, and the German submarine operations having the same object, were referred to as blockades. The British measures consisted rather in extending contraband lists, eliminating the distinction between absolute and conditional contraband, and by her naval power compelling neutral vessels to discharge cargoes in British ports. The latter policy went far beyond accepted rules of visit and search and naval captures, and resembled in its effects the "paper blockades" of the Napoleonic Wars, which, it had been thought, had been eliminated by the Declaration of Paris (1856). After the German declaration of unrestricted submarine warfare early in 1917, this British policy reached its high point in an Order in Council of February 16, 1917: "1. A vessel which is encountered at sea on her way to or from a port in any neutral country affording means of access to the enemy territory without calling at a port in British or Allied territory shall, until the contrary is established, be deemed to be carrying goods with an enemy destination, or of enemy origin, and shall be brought in for examination, and if necessary, for adjudication before the Prize Court. 2. Any vessel carrying goods with an enemy destination, or of enemy origin, shall be liable to capture and condemnation in respect of the carriage of such goods; provided that, in the case of any vessel which calls at an appointed British or Allied port for the examination of her cargo, no sentence of condemnation shall be pronounced in respect only of the carriage of goods of enemy origin or destination, and no such presumption as is laid down in Article 1 shall arise. 3. Goods which are found on the examination of any vessel to be goods of enemy origin or of enemy destination shall be liable to condemnation. . . ."—*London Gazette*, February 21, 1917, p. 1845.

Neither were the German submarine measures "blockades" in the technical sense. Like the British measures, they were designed to cut off the commerce of the enemy; but submarines did not, and it was claimed they could not, exercise the right of visit and search under accepted rules to see if a vessel were "running" the "blockade." They relied consequently on destruction. But destruction was allowed by the rules existing in 1914 (which had been built up in an age of surface ships) only in narrowly restricted circumstances. (See, for example, Art. 49 of the Declaration of London.) It was always required that passengers and crew be placed in a place of safety. The rules said to be violated, however, were not fundamentally those of blockade but those of visit and search and the destruction of prize. See §§ 168-170 above.

Likewise, in the European War beginning September 1, 1939, there have been established no blockades in the legal sense, though statesmen and the press refer to a British "blockade." Great Britain, France, and Germany have not notified the existence of blockades to neutral States (November 15, 1939). Great Britain and Germany have published contraband lists: see note 4a, p. 897, below.—Ed.

ART. 9. A declaration of blockade is made either by the blockading Power or by the naval authorities acting in its name.

It specifies—

- (1) The date when the blockade begins.
- (2) The geographical limits of the coast blockaded.
- (3) The delay to be allowed to neutral vessels for departure.

ART. 10. If the blockading Power, or the naval authorities acting in its name, do not establish the blockade in conformity with the provisions, which, in accordance with Article 9 (1) and (2), must be inserted in the declaration of blockade, the declaration is void, and a new declaration is necessary in order to make the blockade operative.

ART. 11. A declaration of blockade is notified—

(1) To the neutral Powers, by the blockading Power by means of a communication addressed to the Governments themselves, or to their Representatives accredited to it.

(2) To the local authorities, by the officer commanding the blockading force. These authorities will, on their part, inform, as soon as possible, the foreign consuls who exercise their functions in the port or on the coast blockaded.

ART. 12. The rules relative to the declaration and to the notification of blockade are applicable in the case in which the blockade may have been extended, or may have been re-established after having been raised.

ART. 13. The voluntary raising of a blockade, as also any limitation which may be introduced, must be notified in the manner prescribed by Article 11.

ART. 14. The liability of a neutral vessel to capture for breach of blockade is contingent on her knowledge, actual or presumptive, of the blockade.

ART. 15. Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port subsequently to the notification of the blockade made in sufficient time to the Power to which such port belongs.

ART. 16. If a vessel which approaches a blockaded port does not know, or cannot be presumed to know, of the blockade, the notification must be made to the vessel itself by an officer of one of the ships of the blockading force. This notification must be entered in the ship's log-book, with entry of the day and hour, as also of the geographical position of the vessel at the time.

A neutral vessel which leaves a blockaded port must be allowed to pass free, if through the negligence of the officer commanding the blockading force, no declaration of blockade has been notified to the local authorities, or, if in the declaration, as notified, no delay has been indicated.

ART. 17. The seizure of neutral vessels for violation of blockade may be

made only within the radius of action of the ships of war assigned to maintain an effective blockade.

ART. 18. The blockading forces must not bar access to the ports or to the coast of neutrals.³

ART. 19. Whatever may be the ulterior destination of the ship or of her cargo, the evidence of violation of blockade is not sufficiently conclusive to authorize the seizure of the ship if she is at the time bound toward an unblockaded port.⁴

ART. 20. A vessel which in violation of blockade has left a blockaded port or has attempted to enter the port is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned, or if the blockade is raised, her capture can no longer be effected.

ART. 21. A vessel found guilty of breach of blockade is liable to condemnation. The cargo is also liable to condemnation, unless it is proved that at the time the goods were shipped the shipper neither knew nor could have known of the intention to violate the blockade.

CHAPTER II. CONTRABAND OF WAR ^{4a}

ART. 22. The following articles and materials are, without notice, regarded as contraband, under the name of absolute contraband:

³ British note dated July 23, 1915, to United States Government: "A blockade limited to enemy ports would leave open routes by which every kind of German commerce could pass almost as easily as through the ports in her own territory. Rotterdam is indeed the nearest outlet for some of the industrial districts of Germany. . . . As a counterpoise to the freedom with which one belligerent may send his commerce across a neutral country without compromising its neutrality, the other belligerent may fairly claim to intercept such commerce before it has reached, or after it has left, the neutral state, provided, of course, that he can establish that the commerce with which he interferes is the commerce of his enemy and not commerce which is *bona fide* destined for or proceeding from the neutral state. It seems, accordingly, that if it be recognized that a blockade is in certain cases the appropriate method of intercepting the trade of an enemy country, and if the blockade can only become effective by extending it to enemy commerce passing through neutral ports, such an extension is defensible and in accordance with principles which have met with general acceptance." *U. S. For. Rel.*, 1915, *Supplement*, p. 170. Similar doctrines animated the Supreme Court of the United States during the Civil War. See *The Peterhoff*, below, § 182.—ED.

⁴ British Order in Council, March 30, 1916: "From and after the date of this Order, Article 19 of the Declaration of London shall cease to be adopted and put in force. Neither the vessel nor her cargo shall be immune from capture for breach of blockade upon the sole ground that she is at the moment on her way to a non-blockaded port." *U. S. For. Rel.*, 1916, *Supplement*, p. 361.

British Order in Council, July 7, 1916 (abandoning Declaration of London): "(b) The principle of continuous voyage or ultimate destination shall be applicable both in case of contraband and of blockade." See note to Article 30 below.—ED.

^{4a} The British Government announced in September, 1939, the following list of contraband:

"SCHEDULE I

"Absolute Contraband

"(a) All kinds of arms, ammunition, explosives, chemicals, or appliances suitable for use in chemical warfare and machines for their manufacture or repair; component parts thereof; articles necessary or convenient for their use; materials or ingredients used in their manu-

1. Arms of all kinds, including arms for sporting purposes, and their unassembled distinctive parts.
2. Projectiles, charges, and cartridges of all kinds, and their unassembled distinctive parts.
3. Powder and explosives specially adapted for use in war.
4. Gun carriages, caissons, limbers, military wagons, field forges, and their unassembled distinctive parts.

facture; articles necessary or convenient for the production or use of such materials or ingredients.

"(b) Fuel of all kinds; all contrivances for, or means of, transportation on land, in the water or air, and machines used in their manufacture or repair; component parts thereof; instruments, articles, or animals necessary or convenient for their use; materials or ingredients used in their manufacture; articles necessary or convenient for the production or use of such materials or ingredients.

"(c) All means of communication, tools, implements, instruments, equipment, maps, pictures, papers and other articles, machines, or documents necessary or convenient for carrying on hostile operations; articles necessary or convenient for their manufacture or use.

"(d) Coin, bullion, currency, evidences of debt; also metal, materials, dies, plates, machinery, or other articles necessary or convenient for their manufacture.

"SCHEDULE II

"Conditional Contraband

"(e) All kinds of food, foodstuffs, feed, forage, and clothing and articles and materials used in their production."—*Department of State Bulletin*, September 16, 1939, pp. 250-251.

The German Government announced in September, 1939, the following list of contraband:

"ARTICLE I

"The following articles and materials will be regarded as contraband (absolute contraband) if they are destined for enemy territory or the enemy forces:

"*One.* Arms of all kinds, their component parts and their accessories.

"*Two.* Ammunition and parts thereof, bombs, torpedoes, mines and other types of projectiles; appliances to be used for the shooting or dropping of these projectiles; powder and explosives including detonators and igniting materials.

"*Three.* Warships of all kinds, their component parts and their accessories.

"*Four.* Military aircraft of all kinds, their component parts and their accessories; airplane engines.

"*Five.* Tanks, armored cars and armored trains; armor plate of all kinds.

"*Six.* Chemical substances for military purposes; appliances and machines used for shooting or spreading them.

"*Seven.* Articles of military clothing and equipment.

"*Eight.* Means of communication, signaling and military illumination and their component parts.

"*Nine.* Means of transportation and their component parts.

"*Ten.* Fuels and heating substances of all kinds, lubricating oil.

"*Eleven.* Gold, silver, means of payment, evidences of indebtedness.

"*Twelve.* Apparatus, tools, machines and materials for the manufacture or for the utilization of the articles and products named in numbers one to eleven.

"ARTICLE TWO

"Article one of this law becomes article 22 paragraph one of the Prize Law Code.

"This law becomes effective on its promulgation."

The Government of the Reich on September 12, 1939, made an announcement relating to conditional contraband which read in part:

"The following is accordingly announced:

"The following articles and materials will be regarded as contraband (conditional contraband) subject to the conditions of article 24 of the Prize Law Code of August 28, 1939 (Reichsgesetzblatt part one page 1585):

"Foodstuffs (including live animals), beverages and tobacco and the like, fodder and clothing; articles and materials used for their preparation or manufacture.

"This announcement becomes effective on September 14, 1939."—*Department of State Bulletin*, September 23, 1939, p. 285.—Ed.

5. Clothing and equipment of a distinctively military character.
6. All kinds of harness of a distinctively military character.
7. Saddles, draught, and pack animals suitable for use in war.
8. Articles of camp equipment and their unassembled distinctive parts.
9. Armor plates.
10. War-ships and boats and their unassembled parts specially distinctive as suitable for use only on a vessel of war.

11. Implements and apparatus made exclusively for the manufacture of munitions of war, for the manufacture or repair of arms or of military material, for use on land and sea.

ART. 23. Articles and materials which are exclusively used for war may be added to the list of absolute contraband by means of a notified declaration.⁵

⁵ During the World War of 1914, Great Britain (followed for the most part by her Allies) made free use of this Article by making liberal and repeated additions to the absolute contraband list of Article 22, from the lists of conditional and noncontraband and many nonenumerated articles. The process reached a high point April 20, 1916, when the distinction between absolute and conditional contraband was abolished. The *List of Articles Declared Contraband* in which the abolition occurred was subsequently added to.

The following list is from the British Proclamation dated October 14, 1915, the last long list in which the distinction between absolute and conditional contraband was retained. Absolute contraband:

"Schedule 1.

- "1. Arms of all kinds, including arms for sporting purposes, and their component parts.
- "2. Implements and apparatus designed exclusively for the manufacture of munitions of war, or for the manufacture or repair of arms or of war material for use on land or sea.
- "3. Lathes and other machines or machine tools capable of being employed in the manufacture of munitions of war.
- "4. Emery, corundum, natural and artificial (alundum), and carborundum, in all forms.
- "5. Projectiles, charges, and cartridges of all kinds, and their component parts.
- "6. Paraffin wax.
- "7. Powder and explosives specially prepared for use in war.
- "8. Materials used in the manufacture of explosives, including: Nitric acid and nitrates of all kinds; sulphuric acid; fuming sulphuric acid (oleum); acetic acid and acetates; barium chlorate and perchlorate; calcium acetate, nitrate, and carbide; potassium salts and caustic potash; ammonium salts and ammonia liquor; caustic soda, sodium chlorate and perchlorate; mercury; benzol, toluol, xylol, solvent naphtha, phenol (carbolic acid), cresol, naphthalene, and their mixtures and derivatives; aniline and its derivatives; glycerine; acetone; acetic ether; ethyl alcohol; methyl alcohol; ether; sulphur; urea; cyanamide; celluloid.
- "9. Manganese dioxide; hydrochloric acid; bromine; phosphorus; carbon disulphide; arsenic and its compounds; chlorine; phosgene (carbonyl chloride); sulphur dioxide; prussiate of soda; sodium cyanide; iodine and its compounds.
- "10. Capsicum and peppers.
- "11. Gun mountings, limber boxes, limbers, military wagons, field forges and their component parts; articles of camp equipment and their component parts.
- "12. Barbed wire and the implements for fixing and cutting the same.
- "13. Range-finders and their component parts; searchlights and their component parts.
- "14. Clothing and equipment of a distinctively military character.
- "15. Saddle, draught, and pack animals suitable, or which may become suitable for use in war.
- "16. All kinds of harness of a distinctively military character.
- "17. Hides of cattle, buffaloes, and horses; skins of calves, pigs, sheep, goats, and deer; and leather, undressed or dressed, suitable for saddlery, harness, military boots or military clothing; leather belting, hydraulic leather, and pump leather.

The notification is addressed to the Governments of other Powers or to their Representatives accredited to the Power which makes the declaration. A notification made after the opening of hostilities is addressed only to the neutral Powers.

ART. 24. The following articles and materials, susceptible of use in war as well as for purposes of peace, are without notice regarded as contraband of war, under the name of conditional contraband:

- (1) Food.
- (2) Forage and grain suitable for feeding animals.
- (3) Clothing and fabrics for clothing, boots and shoes, suitable for military use.

"18. Tanning substances of all kinds, including quebracho wood and extracts for use in tanning.

"19. Wool, raw, combed, or carded; wool waste; wool tops and noils; woollen or worsted yarns; animal hair of all kinds; and tops, noils, and yarns of animal hair.

"20. Raw cotton, linters, cotton waste, cotton yarns, and cotton piece-goods, and other cotton products capable of being used in the manufacture of explosives.

"21. Flax; hemp; ramie; kapok.

"22. Warships, including boats and their component parts of such a nature that they can only be used on a vessel of war.

"23. Submarine sound-signalling apparatus.

"24. Armour plates.

"25. Aircraft of all kinds, including aeroplanes, airships, balloons, and their component parts, together with accessories and articles suitable for use in connection with aircraft.

"26. Motor vehicles of all kinds and their component parts.

"27. Tyres for motor vehicles and for cycles, together with articles or materials especially adapted for use in the manufacture or repair of tyres.

"28. Mineral oils, including benzine and motor spirit.

"29. Resinous products, camphor, and turpentine (oil and spirit); wood tar and wood-tar oil.

"30. Rubber (including raw, waste, and reclaimed rubber, solutions and jellies containing rubber, or any other preparations containing rubber, balata, and gutta-percha, and the following varieties of rubber, viz., Borneo, Guayule, Jelutong, Palembang, Pontianac, and all other substances containing caoutchouc), and goods made wholly or partly of rubber.

"31. Rattans.

"32. Lubricants.

"33. The following metals: Tungsten, molybdenum, vanadium, sodium, nickel, selenium, cobalt, haematite pig-iron, manganese, electrolytic iron, and steel containing tungsten or molybdenum.

"34. Asbestos.

"35. Aluminium, alumina, and salts of aluminium.

"36. Antimony, together with the sulphides and oxides of antimony.

"37. Copper, unwrought and part wrought; copper wire, alloys and compounds of copper.

"38. Lead, pig, sheet, or pipe.

"39. Tin, chloride of tin, and tin ore.

"40. Ferro-alloys, including ferro-tungsten, ferro-molybdenum, ferro-manganese, ferro-vanadium, and ferro-chrome.

"41. The following ores: Wolframite, sheelite, molybdenite, manganese ore, nickel ore, chrome ore, haematite iron ore, iron pyrites, copper pyrites and other copper ores, zinc ore, lead ore, arsenical ore, and bauxite.

"42. Maps and plans of any place within the territory of any belligerent or within the area of military operations, on a scale of 4 miles to 1 inch or any larger scale, and reproductions on any scale, by photography or otherwise, of such maps or plans."

(Same list submitted by France on November 14.)—*U. S. For. Rel.*, 1915, *Supplement*, pp. 175-176.—Ed.

- (4) Gold and silver in coin or bullion; paper money.
- (5) Vehicles of all kinds available for use in war, and their unassembled parts.
- (6) Vessels, craft, and boats of all kinds, floating docks, parts of docks as also their unassembled parts.
- (7) Fixed railway material and rolling stock, and material for telegraphs, radio-telegraphs and telephones.
- (8) Balloons and flying machines and their unassembled distinctive parts as also their accessories, articles and materials distinctive as intended for use in connection with balloons or flying machines.
- (9) Fuel; lubricants.
- (10) Powder and explosives which are not specially adapted for use in war.
- (11) Barbed wire as also the implements for placing and cutting the same.
- (12) Horseshoes and horseshoeing materials.
- (13) Harness and saddlery material.
- (14) Binocular glasses, telescopes, chronometers and all kinds of nautical instruments.

ART. 25. Articles and materials susceptible of use in war as well as for purposes of peace, and other than those enumerated in Articles 22 and 24, may be added to the list of conditional contraband by means of a declaration which must be notified in the manner provided for in the second paragraph of Article 23.⁶

⁶ This Article was freely used by Great Britain and her Allies to add to the list of conditional contraband in Article 24. Below is printed the list of conditional contraband Articles published in a Proclamation dated October 14, 1915. This list would be longer but for the fact that many of the articles originally declared conditional contraband had already been removed to the list of absolute contraband printed above as a note to Article 23. Conditional contraband:

"Schedule 2.

- "1. Foodstuffs.
- "2. Forage and feeding-stuffs for animals.
- "3. Oleaginous seeds, nuts, and kernels.
- "4. Animal, fish and vegetable oils and fats, other than those capable of use as lubricants, and not including essential oils.
- "5. Fuel, other than mineral oils.
- "6. Powder and explosives not specially prepared for use in war.
- "7. Horseshoes and shoeing materials.
- "8. Harness and saddlery.
- "9. The following articles, if suitable for use in war: Clothing, fabrics for clothing, skins and furs utilizable for clothing, boots and shoes.
- "10. Vehicles of all kinds, other than motor vehicles, available for use in war, and their component parts.
- "11. Railway materials, both fixed and rolling stock, and materials for telegraphs, wireless telegraphs, and telephones.
- "12. Vessels, craft, and boats of all kinds; floating docks and their component parts; parts of docks.
- "13. Field glasses, telescopes, chronometers, and all kinds of nautical instruments.
- "14. Gold and silver in coin or bullion; paper money."—*U. S. For. Rel.*, 1915, *Supplement*, pp. 176-177.—*Ed.*

ART. 26. If a Power waives, so far as it is concerned, the right to regard as contraband of war articles and materials which are comprised in any of the classes enumerated in Articles 22 and 24, it shall make known its intention by a declaration notified in the manner provided for in the second paragraph of Article 23.

ART. 27. Articles and materials, which are not susceptible of use in war, are not to be declared contraband of war.⁷

ART. 28. The following articles are not to be declared contraband of war:

(1) Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of the textile industries, and also yarns of the same.

(2) Nuts and oil seeds; copra.

(3) Rubber, resins, gums and lacs; hops.

(4) Raw hides, horns, bones, and ivory.

(5) Natural and artificial manures, including nitrates and phosphates for agricultural purposes.

(6) Metallic ores.

(7) Earths, clays, lime, chalk, stone, including marble, bricks, slates and tiles.

(8) Chinaware and glass.

(9) Paper and materials prepared for its manufacture.

(10) Soap, paint and colors, including articles exclusively used in their manufacture, and varnishes.

(11) Bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia, and sulphate of copper.

(12) Agricultural, mining, textile, and printing machinery.

(13) Precious stones, semi-precious stones, pearls, mother-of-pearl, and coral.

(14) Clocks and watches, other than chronometers.

(15) Fashion and fancy goods.

(16) Feathers of all kinds, hairs, and bristles.

(17) Articles of household furniture and decorations; office furniture and accessories.⁷

⁷ The prohibitions in Articles 27 and 28 should be compared with the lists of absolute and conditional contraband printed in the notes to Articles 23 and 25. As early as September 21, 1914, a British Proclamation declared: "... the articles enumerated in the schedule hereto will, notwithstanding anything contained in Article 28 of the Declaration of London, be treated as conditional contraband. . . . Copper, unwrought. Lead, pig, sheet, or pipe. Glycerine. Ferrochrome. Haematite iron ore. Magnetic iron ore. Rubber. Hides and skins, raw or rough tanned (but not including dressed leather)."—*U. S. For. Rel.*, 1914, *Supplement*, p. 236.

A *List of Articles, Declared to Be Contraband of War, Presented to Parliament* April 13, 1916, "comprises the articles which have been declared to be absolute contraband as well as those which have been declared to be conditional contraband. The circumstances of the present war are so peculiar that His Majesty's Government consider that for practical purposes

ART. 29. Neither are the following to be regarded as contraband of war:

(1) Articles and materials serving exclusively for the care of the sick and wounded. They may, nevertheless, in case of urgent military necessity and subject to the payment of compensation, be requisitioned, if their destination is that specified in Article 30.

(2) Articles and materials intended for the use of the vessel in which they are found, as well as those for the use of her crew and passengers during the voyage.

ART. 30. Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails either transshipment or transport over land.⁸

ART. 31. Proof of the destination specified in Article 30 is complete in the following cases:

(1) When the goods are documented to be discharged in a port of the enemy or to be delivered to his armed forces.

(2) When the vessel is to call at enemy ports only, or when she is to touch at a port of the enemy or to join his armed forces, before arriving at the neutral port for which the goods are documented.⁸

ART. 32. The ship's papers are complete proof of the voyage of a vessel transporting absolute contraband, unless the vessel is encountered having

the distinction between the two classes of contraband has ceased to have any value. So large a proportion of the inhabitants of the enemy country are taking part, directly or indirectly, in the war that no real distinction can now be drawn between the armed forces and the civilian population. Similarly, the enemy Government has taken control, by a series of decrees and orders, of practically all the articles in the list of conditional contraband, so that they are now available for Government use. So long as these exceptional conditions continue our belligerent rights with respect to the two kinds of contraband are the same, and our treatment of them must be identical."—*U. S. For. Rel.*, 1916, *Supplement*, p. 385.—Ed.

⁸ Articles 30, 33, 34 and 35 and 38 of the Declaration were modified by successive British Orders in Council dated October 29, 1914, October 20, 1915, and March 30, 1916. On July 7, 1916, a *Maritime Rights Order in Council* withdrew the various Orders in Council modifying the Declaration of London, and declared the intention to exercise belligerent rights at sea "in strict accordance with the law of nations." The effect of this was to abandon all idea of covering British practices by the Declaration, even as modified. The rules laid down in the *Maritime Rights Order in Council* in a sense summarize the modifications which had been made.

"(a) The hostile destination required for the condemnation of contraband articles [both absolute and conditional: the distinction had been abandoned April 20, 1915] shall be presumed to exist, until the contrary is shown, if the goods are consigned to or for an enemy authority, or an agent of the enemy State, or to or for a person in territory belonging to or occupied by the enemy, or to or for a person who, during the present hostilities, has forwarded contraband goods to an enemy authority, or an agent of the enemy State, or to or for a person in territory belonging to or occupied by the enemy, or if the goods are consigned 'to order,' or if the ship's papers do not show who is the real consignee of the goods.

"(b) The principle of continuous voyage or ultimate destination shall be applicable both in cases of contraband and of blockade.

"(c) A neutral vessel carrying contraband with papers indicating a neutral destination, which, notwithstanding the destination shown on the papers, proceeds to an enemy port, shall be liable to capture and condemnation if she is encountered before the end of her next voyage."

[(d) is omitted.]—*U. S. For. Rel.*, 1916, *Supplement*, pp. 413-414.—Ed.

manifestly deviated from the route which she ought to follow according to the ship's papers and being unable to justify by sufficient reason such deviation.⁸

ART. 33. Conditional contraband is liable to capture if it is shown that it is destined for the use of the armed forces or of a government department of the enemy State, unless in this latter case the circumstances show that the articles cannot in fact be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under Article 24 (4).⁸

ART. 34. There is presumption of the destination referred to in Article 33 if the consignment is addressed to enemy authorities, or to a merchant, established in the enemy country, and when it is well known that this merchant supplies articles and material of this kind to the enemy. The presumption is the same if the consignment is destined to a fortified place of the enemy, or to another place serving as a base for the armed forces of the enemy; this presumption, however, does not apply to the merchant vessel herself bound for one of these places and of which vessel it is sought to show the contraband character.

Failing the above presumptions, the destination is presumed innocent.

The presumptions laid down in this Article admit proof to the contrary.⁸

ART. 35. Conditional contraband is not liable to capture, except when on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and is not to be discharged at an intervening neutral port.

The ship's papers are conclusive proof of the voyage of the vessel as also of the port of discharge of the goods, unless the vessel is encountered having manifestly deviated from the route which she ought to follow according to the ship's papers and being unable to justify by sufficient reason such deviation.⁸

ART. 36. Notwithstanding the provisions of Article 35, if the territory of the enemy has no seaboard, conditional contraband is liable to capture if it is shown that it has the destination referred to in Article 33.

ART. 37. A vessel carrying articles liable to capture as absolute or conditional contraband may be captured on the high seas or in the territorial waters of the belligerents throughout the whole course of her voyage, even if she has the intention to touch at a port of call before reaching the hostile destination.

ART. 38. A capture is not to be made on the ground of a carriage of contraband previously accomplished and at the time completed.⁸

ART. 39. Contraband is liable to condemnation.

ART. 40. The confiscation of the vessel carrying contraband is allowed if the contraband forms, either by value, by weight, by volume, or by freight, more than half the cargo.

ART. 41. If a vessel carrying contraband is released, the expenses incurred by the captor in the trial before the national prize court as also for the preservation and custody of the ship and cargo during the proceedings are chargeable against the ship.

ART. 42. Goods which belong to the owner of the contraband and which are on board the same vessel are liable to condemnation.

ART. 43. If a vessel is encountered at sea making a voyage in ignorance of the hostilities or of the declaration of contraband affecting her cargo, the contraband is not to be condemned except with indemnity; the vessel herself and the remainder of the cargo are exempt from condemnation and from the expenses referred to in Article 41. The case is the same if the master after becoming aware of the opening of hostilities, or of the declaration of contraband, has not yet been able to discharge the contraband.

A vessel is deemed to be aware of the state of war, or of the declaration of contraband, if she left a neutral port after there had been made in sufficient time the notification of the opening of hostilities, or of the declaration of contraband, to the power to which such port belongs. A vessel is also deemed to be aware of a state of war if she left an enemy port after the opening of hostilities.

ART. 44. A vessel stopped because carrying contraband, and not liable to condemnation on account of the proportion of contraband, may, according to circumstances, be allowed to continue her voyage if the master is ready to deliver the contraband to the belligerent ship.

The delivery of the contraband is to be entered by the captor on the log-book of the vessel stopped and the master of the vessel must furnish the captor duly certified copies of all relevant papers.

The captor is at liberty to destroy the contraband which is thus delivered to him.

CHAPTER III. UNNEUTRAL SERVICE

ART. 45. A neutral vessel is liable to be condemned and, in a general way, is liable to the same treatment which a neutral vessel would undergo when liable to condemnation on account of contraband of war:

(1) If she is making a voyage specially with a view to the transport of individual passengers who are embodied in the armed force of the enemy, or with a view to the transmission of information in the interest of the enemy.

(2) If, with the knowledge of the owner, of the one who charters the vessel entire, or of the master, she is transporting a military detachment of

the enemy, or one or more persons who, during the voyage, lend direct assistance to the operations of the enemy.

In the cases specified in the preceding paragraphs (1) and (2), goods belonging to the owner of the vessel are likewise liable to condemnation.

The provisions of the present Article do not apply if when the vessel is encountered at sea, she is unaware of the opening of hostilities, or if the master, after becoming aware of the opening of hostilities, has not been able to disembark the passengers. The vessel is deemed to know of the state of war if she left an enemy port after the opening of hostilities; or a neutral port after there had been made in sufficient time a notification of the opening of hostilities to the Power to which such port belongs.

ART. 46. A neutral vessel is liable to be condemned and, in a general way, is liable to the same treatment which she would undergo if she were a merchant vessel of the enemy:

- (1) If she takes a direct part in the hostilities.
- (2) If she is under the orders or under the control of an agent placed on board by the enemy Government.
- (3) If she is chartered entire by the enemy Government.
- (4) If she is at the time and exclusively either devoted to the transport of enemy troops or to the transmission of information in the interest of the enemy.^{8a}

In the cases specified in the present Article, the goods belonging to the owner of the vessel are likewise liable to condemnation.

ART. 47. Any individual embodied in the armed force of the enemy, and who is found on board a neutral merchant vessel may be made a prisoner of war, even though there be no ground for the capture of the vessel.

CHAPTER IV. DESTRUCTION OF NEUTRAL PRIZES⁹

ART. 48. A captured neutral vessel is not to be destroyed by the captor, but must be taken into such port as is proper in order to determine there the rights as regards the validity of the capture.¹⁰

^{8a} See *The Manouba*, § 187 below.—Ed.

⁹ Compare §§ 165-170, above.—Ed.

¹⁰ German note to American Government, received February 8, 1915: "For this purpose beginning February 18, 1915, it will endeavor to destroy every enemy merchant ship that is found in this area of war without its always being possible to avert the peril, that thus threatens persons and cargoes. Neutrals are therefore warned against further entrusting crews, passengers and wares to such ships. Their attention is also called to the fact, that it is advisable for their ships to avoid entering this area, for even though the German naval forces have instructions to avoid violence to neutral ships in so far as they are recognizable, in view of the misuse of neutral flags ordered by the British Government and the contingencies of naval warfare their becoming victims of torpedoes directed against enemy ships cannot always be avoided . . ."—*U. S. For. Rel.*, 1915, *Supplement*, p. 96. This policy was not abandoned until after the sinking of the *Lusitania* and the *Sussex*. Its resumption on February 1, 1917, resulted in the entry of the United States into the war.—Ed.

ART. 49. As an exception, a neutral vessel captured by a belligerent ship, and which would be liable to condemnation, may be destroyed if the observance of Article 48 would involve danger to the ship of war or to the success of the operations in which she is at the time engaged.

ART. 50. Before the destruction the persons on board must be placed in safety, and all the ship's papers and other documents which those interested consider relevant for the decision as to the validity of the capture must be taken on board the ship of war.

ART. 51. A captor who has destroyed a neutral vessel must, as a condition precedent to any decision upon the validity of the capture, establish in fact that he only acted in the face of an exceptional necessity such as is contemplated in Article 49. Failing to do this, he must compensate the parties interested without examination as to whether or not the capture was valid.

ART. 52. If the capture of a neutral vessel, of which the destruction has been justified, is subsequently held to be invalid, the captor must compensate those interested, in place of the restitution to which they would have been entitled.

ART. 53. If neutral goods which were not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation.

ART. 54. The captor has the right to require the giving up of, or to proceed to destroy, goods liable to condemnation found on board a vessel which herself is not liable to condemnation, provided that the circumstances are such as, according to Article 49, justify the destruction of a vessel liable to condemnation. The captor enters the goods delivered or destroyed in the log-book of the vessel stopped, and must procure from the master duly certified copies of all relevant papers. When the giving up or destruction has been completed and the formalities have been fulfilled, the master must be allowed to continue his voyage.

The provisions of Articles 51 and 52 respecting the obligations of a captor who has destroyed a neutral vessel are applicable.

CHAPTER V. TRANSFER OF FLAG

ART. 55. The transfer of an enemy vessel to a neutral flag, effected before the opening of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences which the enemy character of the vessel would involve. There is, however, a presumption that the transfer is void if the bill of sale is not on board in case the vessel has lost her belligerent nationality less than sixty days before the opening of hostilities. Proof to the contrary is admitted.

There is absolute presumption of the validity of a transfer effected more than thirty days before the opening of hostilities if it is absolute, complete,

conforms to the laws of the countries concerned, and if its effect is such that the control of the vessel and the profits of her employment do not remain in the same hands as before the transfer.

If, however, the vessel lost her belligerent nationality less than sixty days before the opening of hostilities, and if the bill of sale is not on board, the capture of the vessel would not give a right to compensation.

ART. 56. The transfer of an enemy vessel to a neutral flag, effected after the opening of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences which the enemy character of the vessel would involve.

There is, however, absolute presumption that a transfer is void:

(1) If the transfer has been made during a voyage or in a blockaded port.

(2) If there is a right of redemption or of reversion.

(3) If the requirements upon which the right to fly the flag depends according to the laws of the country of the flag hoisted have not been observed.

CHAPTER VI. ENEMY CHARACTER

ART. 57. Subject to the provisions respecting the transfer of flag, the neutral or enemy character of a vessel is determined by the flag which she has the right to fly.¹¹

The case in which a neutral vessel is engaged in a trade which is reserved in time of peace, remains outside the scope of, and is in no wise affected by this rule.

ART. 58. The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner.

ART. 59. If the neutral character of goods found on board an enemy vessel is not proven, they are presumed to be enemy goods.

ART. 60. The enemy character of goods on board an enemy vessel continues until they reach their destination, notwithstanding an intervening transfer after the opening of hostilities while the goods are being forwarded.

If, however, prior to the capture a former neutral owner exercises, on the bankruptcy of a present enemy owner, a legal right to recover the goods, they regain their neutral character.

¹¹ British Order in Council, dated October 20, 1915: "Whereas, by Article 57 of the said declaration, it is provided that the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly; and Whereas it is no longer expedient to adopt the said article: Now, therefore, His Majesty, by and with the advice of his Privy Council, is pleased to order, and it is hereby ordered, that from and after this date Article 57 of the Declaration of London shall cease to be adopted and put in force. In lieu of the said article, British prize courts shall apply the rules and principles formerly observed in such courts."—*U. S. For. Rel.*, 1915, *Supplement*, p. 179.—ED.

CHAPTER VII. CONVOY

ART. 61. Neutral vessels under convoy of their national flag are exempt from search. The commander of a convoy gives, in writing, at the request of the commander of a belligerent ship of war, all information as to the character of the vessels and their cargoes, which could be obtained by visit and search.

ART. 62. If the commander of the belligerent ship of war has reason to suspect that the confidence of the commander of the convoy has been abused, he communicates his suspicions to him. In such a case it is for the commander of the convoy alone to conduct an investigation. He must state the result of such investigation in a report, of which a copy is furnished to the officer of the ship of war. If, in the opinion of the commander of the convoy, the facts thus stated justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels.

CHAPTER VIII. RESISTANCE TO SEARCH

ART. 63. Forcible resistance to the legitimate exercise of the right of stoppage, visit and search, and capture, involves in all cases the condemnation of the vessel. The cargo is liable to the same treatment which the cargo of an enemy vessel would undergo. Goods belonging to the master or owner of the vessel are regarded as enemy goods.

CHAPTER IX. COMPENSATION

ART. 64. If the capture of a vessel or of goods is not upheld by the prize court, or if without being brought to judgment the captured vessel is released, those interested have the right to compensation, unless there were sufficient reasons for capturing the vessel or goods.

FINAL PROVISIONS

ART. 65. The provisions of the present Declaration form an indivisible whole.

ART. 66. The Signatory Powers undertake to secure the reciprocal observance of the rules contained in this Declaration in case of a war in which the belligerents are all parties to this Declaration. They will therefore issue the necessary instructions to their authorities and to their armed forces, and will take the measures which are proper in order to guarantee the application of the Declaration by their Courts and more particularly by their prize courts.

ART. 67. The present Declaration shall be ratified as soon as possible. The ratification shall be deposited in London.

The first deposit of ratifications shall be recorded in a Protocol signed

by the Representatives of the Powers taking part therein, and by His Britannic Majesty's Principal Secretary of State for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification addressed to the British Government, and accompanied by the instrument of ratification.

A duly certified copy of the Protocol relating to the first deposit of ratifications, and of the notifications mentioned in the preceding paragraph as well as of the instruments of ratification which accompany them, shall be immediately sent by the British Government, through the diplomatic channel, to the Signatory Powers. The said Government shall, in the cases contemplated in the preceding paragraph, inform them at the same time of the date on which it received the notification.

ART. 68. The present Declaration shall take effect, in the case of the Powers which were parties to the first deposit of ratifications, sixty days after the date of the Protocol recording such deposit, and, in the case of the Powers which shall ratify subsequently, sixty days after the notification of their ratification shall have been received by the British Government.

ART. 69. If it happens that one of the Signatory Powers wishes to denounce the present Declaration, such denunciation can only be made to take effect at the end of a period of twelve years, beginning sixty days after the first deposit of ratifications, and, after that time, at the end of successive periods of six years, of which the first will begin at the end of the period of twelve years.

Such denunciation must be notified in writing, at least one year in advance, to the British Government, which shall inform all the other Powers.

It will only operate in respect of the Power which shall have made the notification.

ART. 70. The Powers represented at the London Naval Conference attach particular value to the general recognition of the rules which they have adopted and express the hope that the Powers which were not represented will adhere to the present Declaration. They request the British Government to invite them to do so.

A Power which desires to adhere notifies its intention in writing to the British Government, in transmitting the act of adhesion, which will be deposited in the archives of the said Government.

The said Government shall forthwith transmit to all the other Powers a duly certified copy of the notification, as also of the act of adhesion, stating the date on which it received the notification. The adhesion takes effect sixty days after such date.

The position of the adhering Powers shall be in all matters concerning this Declaration similar to the position of the Signatory Powers.

ART. 71. The present Declaration, which shall bear the date of the 26th

February, 1909, may be signed in London until the 30th June, 1909, by the Plenipotentiaries of the Powers represented at the Naval Conference.

In faith whereof the Plenipotentiaries have signed the present Declaration, and have thereto affixed their seals.

Done at London, the twenty-sixth day of February, one thousand nine hundred and nine, in a single original, which shall remain deposited in the archives of the British Government, and of which duly certified copies shall be sent through the diplomatic channel to the Powers represented at the Naval Conference.

§ 182. DISTINCTION BETWEEN BLOCKADE AND CONTRABAND: ULTERIOR DESTINATION

The Peterhoff

SUPREME COURT OF THE UNITED STATES, 1866

5 Wallace (U. S.) 28-62.

The CHIEF JUSTICE delivered the opinion of the court.

This case is of much interest. It was very thoroughly argued, and has been attentively considered.

The *Peterhoff* was captured near the island of St. Thomas, in the West Indies, on the 25th of February, 1863, by the United States Steamship *Vanderbilt*. She was fully documented as a British merchant steamer, bound from London to Matamoras, in Mexico, but was seized, without question of her neutral nationality, upon suspicion that her real destination was to the blockaded coast of the States in rebellion, and that her cargo consisted, in part, of contraband goods.

The evidence in the record satisfies us that the voyage of the *Peterhoff* was not simulated. She was in the proper course of a voyage from London to Matamoras. Her manifest, shipping list, clearance, and other custom-house papers, all show an intended voyage from the one port to the other. And the preparatory testimony fully corroborates the documentary evidence.

Nor have we been able to find anything in the record which fairly warrants a belief that the cargo had any other direct destination. All the bills of lading show shipments to be delivered off the mouth of the Rio Grande, into lighters, for Matamoras. And this was in the usual course of trade. Matamoras lies on the Rio Grande forty miles above its mouth; and the *Peterhoff's* draught of water would not allow her to enter the river. She could complete her voyage, therefore, in no other way than by the delivery of her cargo into lighters for conveyance to the port of destination. It is true that, by these lighters, some of the cargo might be conveyed directly to the

blockaded coast; but there is no evidence which warrants us in saying that such conveyance was intended by the master or the shippers.

We dismiss, therefore, from consideration, the claim, suggested rather than urged in behalf of the government, that the ship and cargo, both or either, were destined for the blockaded coast.

But it was maintained in argument (1) that trade with Matamoras, at the time of the capture, was made unlawful by the blockade of the mouth of the Rio Grande; and if not, then (2) that the ulterior destination of the cargo was Texas and the other States in rebellion, and that this ulterior destination was in breach of the blockade.

We agree that, so far as liability for infringement of blockade is concerned, ship and cargo must share the same fate. The owners of the former were owners also of part of the latter; the adventure was common; the destination of the cargo, ulterior as well as direct, was known to the owners of the ship, and the voyage was undertaken to promote the objects of the shippers. There is nothing in this case as in that of the *Springbok* to distinguish between the liability of the ship and that of the merchandise it conveyed.

We proceed to inquire, therefore, whether the mouth of the Rio Grande was, in fact, included in the blockade of the rebel coast?

It must be premised that no paper or constructive blockade is allowed by international law. When such blockades have been attempted by other nations, the United States have ever protested against them and denied their validity. Their illegality is now confessed on all hands. It was solemnly proclaimed in the Declaration of Paris of 1856, to which most of the civilized nations of the world have since adhered; and this principle is nowhere more fully recognized than in our own country, though not a party to that declaration.

What then was the blockade of the rebel States? The President's proclamation of the 19th April, 1862 [1861], declared the intention of the government "to set on foot a blockade of the ports" of those States, "by posting a competent force so as to prevent the entrance or exit of vessels." 12 Stat. at Large, 1259. And, in explanation of this proclamation, foreign governments were informed "That it was intended to blockade the whole coast from the Chesapeake Bay to the Rio Grande." Lawrence's *Wheaton*, 829, *n*.

In determining the question whether this blockade was intended to include the mouth of the Rio Grande, the treaty with Mexico, 9 Stat. at Large, 926, in relation to that river, must be considered. It was stipulated in the 5th article that the boundary line between the United States and Mexico should commence in the Gulf, three leagues from land opposite the mouth of the Rio Grande, and run northward with the middle of the river. And in the 7th article it was further stipulated that the navigation of the river

should be free and common to the citizens of both countries without interruption by either without the consent of the other, even for the purpose of improving the navigation.

The mouth of the Rio Grande was, therefore, for half its width, within Mexican territory, and, for the purposes of navigation, was, altogether, as much Mexican as American. It is clear, therefore, that nothing short of an express declaration by the Executive would warrant us in ascribing to the government an intention to blockade such a river in time of peace between the two Republics.

It is supposed that such a declaration is contained in the President's proclamation of February 18th, 1864, 13 Stat. at Large, 740, which recites as matter of fact that the port of Brownsville had been blockaded, and declares the relaxation of the blockade. The argument is that Brownsville is situated on the Texan bank of the Rio Grande, opposite Matamoras; and that the recital in the proclamation that Brownsville had been blockaded must therefore be regarded as equivalent to an assertion that the mouth of the river was included in the blockade of the coast. It would be difficult to avoid this inference if Brownsville could only be blockaded by the blockade of the river. But that town may be blockaded also by the blockade of the harbor of Brazos Santiago and the Boca Chica, which were, without question, included in the blockade of the coast. Indeed, until within a year prior to the proclamation, the port of entry for the district was not Brownsville, but Point Isabel on that harbor; and, in the usual course, merchandise intended for Brownsville was entered at Point Isabel, and taken by a short land conveyance to its destination.

We know of no judicial precedent for extending a blockade by construction. But there are precedents of great authority the other way. We will cite one.

The *Frau Ilsabe*, 4 Robinson, 63, and her cargo were captured in 1799 for breach of the British blockade of Holland. The voyage was from Hamburg to Antwerp, and, of course, in its latter part, up the Scheldt. Condemnation of the cargo was asked on the ground that the Scheldt was blockaded by the blockade of Holland. But Sir W. Scott said, "Antwerp is certainly no part of Holland, and, with respect to the Scheldt, it is not within the Dutch territory, but rather a coterminous river, dividing Holland from the adjacent country." This case is the more remarkable inasmuch as Antwerp is on the right bank of the river, as is also the whole territory of Holland; and, though no part of that country was part of Flanders, then equally with Holland combined with France in a war with Great Britain. "It was just as lawful," as Sir W. Scott observed, "to blockade the port of Flanders as those of Holland," and the Scheldt might have been included in the blockade, but he

would not hold it necessarily included in the absence of an express declaration.

This case seems to be in point.

It is impossible to say, therefore, in the absence of an express declaration to that effect, that it was the intention of the government to blockade the mouth of the Rio Grande. And we are the less inclined to say it, because we are not aware of any instance in which a belligerent has attempted to blockade the mouth of a river or harbor occupied on one side by neutrals, or in which such a blockade has been recognized as valid by any court administering the law of nations.

The only case which lends even apparent countenance to such a doctrine, is that of *The Maria*, 6 Robinson, 201, adjudged by Sir W. Scott in 1805. The cargo in litigation had been conveyed from Bremen, through the Weser to Varel, near the mouth of the Jahde, and there transhipped for America. The mouth of the Weser was then blockaded, and Sir W. Scott held, that the commerce of Bremen, though neutral, could not be carried on through the Weser. This, he admitted, was a great inconvenience to the neutral city, which had no other outlet to the sea; but it was an incident of her situation and of war. It happened in that case that a relaxation of the blockade in favor of Bremen warranted restitution. Otherwise there can be no doubt that the cargo would have been reluctantly condemned.

But it is an error to suppose this case an authority for an American blockade of the Rio Grande, affecting the commerce of Matamoras. Counsel were mistaken in the supposition that only one bank of the Weser was occupied by the French, and that Bremen was on the other. Both banks were in fact so held, and the blockade was warranted by the hostile possession of both. The case would be in point had both banks of the Rio Grande been in rebel occupation.

Still less applicable to the present litigation is the case of *The Zelden Rust*, cited at the bar. That was not a case of violation of blockade at all. It was a question of contraband, depending on destination. The *Zelden Rust*, a neutral vessel, entered the Bay or River De Betancos, on one side of which was Ferrol, and on the other Corunna. Counsel argued on the supposition that Ferrol was a belligerent and Corunna a neutral port, whereas both were belligerent; and the cargo was condemned on the ground of actual or probable destination to Ferrol, which was a port of naval equipment; though nominally destined to Corunna, also a port of naval equipment, though not to the same extent as Ferrol. There was no blockade of the bay or river or of either town.

It is unnecessary to examine other cases referred to by counsel. It is sufficient to say that none of them support the doctrine that a belligerent can

blockade the mouth of a river, occupied on one bank by neutrals with complete rights of navigation.

We have no hesitation, therefore, in holding that the mouth of the Rio Grande was not included in the blockade of the ports of the rebel States, and that neutral commerce with Matamoras, except in contraband, was entirely free.

If we had any doubt upon the subject, it would be removed by the fact that it was the known and constant practice of the government to grant bond that no supplies should be furnished to the rebels—a condition necessarily municipal in its nature and inapplicable to any clearance for a foreign port. These clearances are incompatible with the existence of the supposed blockade.

We come next to the question whether an ulterior destination to the rebel region, which we now assume as proved, affected the cargo of the *Peterhoff* with liability to condemnation. We mean the neutral cargo; reserving for the present the question of contraband, and questions arising upon citizenship or nationality of shippers.

It is an undoubted general principle, recognized by this court in the case of *The Bermuda*, and in several other cases, that an ulterior destination to a blockaded port will infect the primary voyage to a neutral port with liability for intended violation of blockade.

The question now is whether the same consequence will attend an ulterior destination to a belligerent country by inland conveyance. And upon this question the authorities seem quite clear.

During the blockade of Holland of 1799, goods belonging to Prussian subjects were shipped from Edam, near Amsterdam, by inland navigation to Emden, in Hanover, for transshipment to London. Prussia and Hanover were neutral. The goods were captured on the voyage from Emden, and the cause (*The Stert*, 4 Robinson, 65) came before the British Court of Admiralty in 1801. It was held that the blockade did not affect the trade of Holland carried on with neutrals by means of inland navigation. "It was," said Sir William Scott, "a mere maritime blockade effected by force operating only at sea." He admitted that such trade would defeat, partially at least, the object of the blockade, namely, to cripple the trade of Holland, but observed, "If that is the consequence, all that can be said is that it is an unavoidable consequence. It must be imputed to the nature of the thing which will not admit a remedy of this species. The court cannot on that ground take upon itself to say that a legal blockade exists where no actual blockade can be applied. . . . It must be presumed that this was foreseen by the blockading state, which, nevertheless, thought proper to impose it to the extent to which it was practicable."

The same principle governed the decision in the case of *The Ocean*,

(The *Stert*, 3 Robinson, 297) made also in 1801. At the time of her voyage Amsterdam was blockaded, but the blockade had not been extended to the other ports of Holland. Her cargo consisted partly or wholly of goods ordered by American merchants from Amsterdam, and sent thence by inland conveyance to Rotterdam, and there shipped to America. It was held that the conveyance from Amsterdam to Rotterdam, being inland, was not affected by the blockade, and the goods, which had been captured, were restored.

These were cases of trade from a blockaded to a neutral country, by means of inland navigation, to a neutral port or a port not blockaded. The same principle was applied to trade from a neutral to a blockaded country by inland conveyance from the neutral port of primary destination to the blockaded port of ulterior destination in the case of *Jonge Pieter*, (4 Robinson, 79) adjudged in 1801. Goods belonging to neutrals going from London to Emden, with ulterior destination by land or an interior canal navigation to Amsterdam, were held not liable to seizure for violation of the blockade of that port. The particular goods in that instance were condemned upon evidence that they did not in fact belong to neutrals, but to British merchants, engaged in unlawful trade with the enemy; but the principle just stated was explicitly affirmed.

These cases fully recognize the lawfulness of neutral trade to or from a blockaded country by inland navigation or transportation. They assert principles without disregard of which it is impossible to hold that inland trade from Matamoras, in Mexico, to Brownsville or Galveston, in Texas, or from Brownsville or Galveston to Matamoras, was affected by the blockade of the Texan coast.

And the general doctrines of international law lead irresistibly to the same conclusion. We know of but two exceptions to the rule of free trade by neutrals with belligerents: the first is that there must be no violation of blockade or siege; and the second, that there must be no conveyance of contraband to either belligerent. And the question we are now considering is, "Was the cargo of the *Peterhoff* within the first of these exceptions?" We have seen that Matamoras was not and could not be blockaded; and it is manifest that there was not and could not be any blockade of the Texan bank of the Rio Grande as against the trade of Matamoras. No blockading vessel was in the river; nor could any such vessel ascend the river, unless supported by a competent military force on land.

The doctrine of *The Bermuda* case, supposed by counsel to have an important application to that before us, has, in reality, no application at all. There is an obvious and broad line of distinction between the cases. The *Bermuda* and her cargo were condemned because engaged in a voyage ostensibly for a neutral, but in reality either directly or by substitution of

another vessel, for a blockaded port. The Peterhoff was destined for a neutral port with no ulterior destination for the ship, or none by sea for the cargo to any blockaded place. In the case of the Bermuda, the cargo destined primarily for Nassau could not reach its ulterior destination without violating the blockade of the rebel ports; in the case before us the cargo, destined primarily for Matamoras, could reach an ulterior destination in Texas without violating any blockade at all.

We must say, therefore, that trade, between London and Matamoras, even with intent to supply, from Matamoras, goods to Texas, violated no blockade, and cannot be declared unlawful.

Trade with a neutral port in immediate proximity to the territory of one belligerent, is certainly very inconvenient to the other. Such trade, with unrestricted inland commerce between such a port and the enemy's territory, impairs undoubtedly and very seriously impairs the value of a blockade of the enemy's coast. But in cases such as that now in judgment, we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country. We must follow the lights of reason and the lessons of the masters of international jurisprudence.

The remedy for inconveniences of the sort just mentioned is with the political department of the government. In the particular instance before us, the Texan bank of the Rio Grande might have been occupied by the national forces; or with the consent of Mexico, military possession might have been taken of Matamoras and the Mexican bank below. In either course Texan trade might have been entirely cut off. Sufficient reasons, doubtless, prevailed against the adoption of either. The inconvenience, at the time, was doubtless supposed to outweigh any advantage that might be expected from the interruption of the trade.

What has been said sufficiently indicates our judgment that the ship and cargo are free from liability for violation of blockade.

We come then to other questions.

Thus far we have not thought it necessary to discuss the question of actual destination beyond Matamoras. Nor need we now say more upon that general question than that we think it a fair conclusion from the whole evidence that the cargo was to be disposed of in Mexico or Texas as might be found most convenient and profitable to the owners and consignees, who were either at Matamoras or on board the ship. Destination in this case becomes specially important only in connection with the question of contraband.

And this brings us to the question: Was any portion of the cargo of the Peterhoff contraband?

The classification of goods as contraband or not contraband has much

perplexed text writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes. Lawrence's *Wheaton*, 772-6, note; *The Commercen*, 1 *Wheaton*, 382; Dana's *Wheaton*, 629, note; Parsons' *Mar. Law*, 93-4. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.

A considerable portion of the cargo of the *Peterhoff* was of the third class, and need not be further referred to. A large portion, perhaps, was of the second class, but is not proved, as we think, to have been actually destined to belligerent use, and cannot therefore be treated as contraband. Another portion was, in our judgment, of the first class, or, if of the second, destined directly to the rebel military service. This portion of the cargo consisted of the cases of artillery harness, and of articles described in the invoices as "men's army bluchers," "artillery boots," and "government regulation gray blankets." These goods come fairly under the description of goods primarily and ordinarily used for military purposes in time of war. They make part of the necessary equipment of an army.

It is true that even these goods, if really intended for sale in the market of Matamoras, would be free of liability: for contraband may be transported by neutrals to a neutral port, if intended to make part of its general stock in trade. But there is nothing in the case which tends to convince us that such was their real destination, while all the circumstances indicate that these articles, at least, were destined for the use of the rebel forces then occupying Brownsville, and other places in the vicinity.

And contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture only when a violation of blockade is intended; the former when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockaded or not. The trade of neutrals with belligerents in articles not contraband is absolutely free unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea. Hence, while articles, not contraband, might be sent to

Matamoras and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character, destined in fact to a State in rebellion, or for the use of the rebel military forces, were liable to capture though primarily destined to Matamoras.

We are obliged to conclude that the portion of the cargo which we have characterized as contraband must be condemned.

And it is an established rule that the part of the cargo belonging to the same owner as the contraband portion must share its fate. This rule is well stated by Chancellor Kent, thus: "Contraband articles are infectious, as it is called, and contaminate the whole cargo belonging to the same owners, and the invoice of any particular article is not usually admitted to exempt it from general confiscation."

So much of the cargo of the *Peterhoff*, therefore, as actually belonged to the owner of the artillery harness, and the other contraband goods, must be also condemned.

Two other questions remain to be disposed of.

The first of these relates to the political status of *Redgate*, one of the owners of the cargo. It was insisted, in the argument for the government, that this person was an enemy, and that the merchandise owned by him was liable to capture and confiscation as enemy's property.

It appears that he was by birth an Englishman; that he became a citizen of the United States; that he resided in Texas at the outbreak of the rebellion; made his escape; became a resident of Matamoras; had been engaged in trade there, not wholly confined, probably, to Mexico; and was on his return from England with a large quantity of goods, only a small part of which, however, was his own property, with the intention of establishing a mercantile house in that place.

It has been held, by this court, that persons residing in the rebel States at any time during the civil war must be considered as enemies, during such residence, without regard to their personal sentiments or dispositions. *Prize Cases*, 2 Black, 666, 687-8; *The Venice*, 2 Wallace, 258; *Mrs. Alexander's Cotton*, Id. 404.

But this has never held in respect to persons faithful to the Union, who have escaped from those States, and have subsequently resided in the loyal States, or in neutral countries. Such citizens of the United States lost no rights as citizens by reason of temporary and constrained residence in the rebellious portion of the country.

And to this class *Redgate* seems to have belonged. He cannot, therefore, be regarded as an enemy. If his property was liable to seizure at all on account of his political character, it was as property of a citizen of the United States, proceeding to a State in insurrection. But we see no sufficient ground for distinguishing that portion of the cargo owned by him, as to destination, from any other portion.

The other question relates to costs and expenses.

Formerly conveyance of contraband subjected the ship to forfeiture; but in more modern times, that consequence, in ordinary cases, attaches only to the freight of the contraband merchandise. That consequence only attaches in the present case.

But the fact of such conveyance may be properly taken into consideration, with other circumstances, in determining the question of costs and expenses.

It was the duty of the captain of the *Peterhoff*, when brought to by the *Vanderbilt*, to send his papers on board, if required. He refused to do so. The circumstances might well excite suspicion. The captain of a merchant steamer like the *Peterhoff* is not privileged from search by the fact that he has a government mail on board; on the contrary he is bound by that circumstance to strict performance of neutral duties and to special respect for belligerent rights.

The search led to the belief on the part of the officers of the *Vanderbilt* that there was contraband on board, destined to the enemy. This belief, it is now apparent, was warranted. It was therefore the duty of the captors to bring the *Peterhoff* in for adjudication, and clearly they are not liable for the costs and expenses of doing so.

On the other hand, not only was the captain in the wrong in the refusal just mentioned, but it appears that papers were destroyed on board his ship at the time of capture. Some papers were burned by a passenger named Mohl, or by his directions. A package was also thrown overboard by direction of the captain. This package is variously described by the witnesses as a heavy sealed package wrapped in loose paper; as a box of papers; and as a packet of despatches sealed up in canvas and weighted with lead. By the captain it is represented as a package belonging to Mohl, and containing a white powder. We are unable to credit this representation. It is highly improbable that, under the circumstances described by the captain, he would have thrown any package overboard at such a time, and with the plain intent of concealing it from the captors, if it contained nothing likely, in his opinion, to prejudice the case of the ship and cargo.

We must say that his conduct was inconsistent with the frankness and good faith to which neutrals, engaged in a commerce open to great suspicion, are most strongly bound. Considering the other facts in the case, however, and the almost certain destination of the ship to a neutral port, with a cargo, for the most part, neutral in character and destination, we shall not extend the effect of this conduct of the captain to condemnation, but we shall decree payment of costs and expenses by the ship as a condition of restitution.

DECREE ACCORDINGLY.

§ 183. AN EXAMPLE OF THE TRADITIONAL LAW OF
BLOCKADE*The Adula*

SUPREME COURT OF THE UNITED STATES, 1900

176 U. S. 361.

This was a libel in prize against the British steamship *Adula*, then under charter to a Spanish subject, which was seized June 29, 1898, by the United States cruiser *Marblehead*, for attempting to run the blockade established at Guantanamo Bay in the island of Cuba, and was subsequently sent into the port of Savannah for adjudication. . . .

On June 27th the *Adula*, then at Kingston, was engaged in taking on a cargo for shipment. On the 28th she discharged this cargo, and the agent of the Atlas Company entered into a charter party with one Solis, a Spanish subject formerly resident in Manzanillo. . . .

. . . The *Adula* left Kingston late in the afternoon of June 28th. Before sailing, Solis asked from the United States consul at Kingston a permit to enter the ports of Guantanamo, Santiago, and Manzanillo. This the consul refused to give without special instructions from Washington. Just before sailing to Santiago, Solis cabled for a licensed pilot to meet the *Adula*. On leaving Kingston she took her course around Morant Point at the easterly end of the island, first toward Santiago, and then to Guantanamo, and about 4 P. M. of the following day was met before reaching the harbor and brought to by the steamship *Vixen*; was directed to proceed, entered the harbor of Guantanamo, and was seized by the *Marblehead*, which, with other vessels of the fleet, was lying inside the bay and was sent to Savannah, where a libel in prize was filed against her on July 21, 1898. The depositions *in preparatorio* were taken July 21, and her owner, the Atlas Steamship Company, appeared as claimant and filed its answer. The case was heard upon the proofs *in preparatorio*, and a decree of condemnation entered July 28th. (89 F. 351.) Before the decree, claimant moved for leave to take further proofs. The court set the motion down for August 9, giving claimant leave to serve such affidavits and other papers as it might desire to read upon the motion, and directed the entry of the decree to be without prejudice to such motion. The motion was finally denied, and the vessel released upon a stipulation for her value.

From the decree of condemnation her owner and claimant appealed to this court.

MR. JUSTICE BROWN, after stating the case, delivered the opinion of the Court. The rectitude of the decree of the District Court condemning the

Adula as prize of war depends upon the existence of a lawful and effective blockade at Guantanamo, the knowledge of such blockade by those in charge of the vessel, and their intent in making the voyage from Kingston.

1. No blockade of Guantanamo was ever proclaimed by the President. A proclamation had been issued June 27, establishing a blockade of all ports on the southern coast of Cuba between Cape Frances on the west and Cape Cruz on the east, but as both Santiago and Guantanamo are to the eastward of Cape Cruz, they were not included. It appears, however, that blockades of Santiago and Guantanamo were established in the early part of June by order of Admiral Sampson, commander of the naval forces then investing the ports on the southern coast of Cuba, and were maintained as actual and effective blockades until after the capture of the Adula.

The legality of a simple or actual blockade as distinguished from a public or Presidential blockade is noticed by writers upon international law, and is said by Halleck to be "constituted merely by the fact of an investment, and without any necessity of a public notification. As it arises solely from facts it ceases when they terminate; its existence must, therefore, in all cases, be established by clear and decisive evidence." (Halleck, International Law, c. 23, § 10.) A *de facto* blockade was also recognized as legal by this court in the case of *The Circassian*, 2 Wall. 135, 150, in which the question arose as to the blockade of New Orleans during the Civil War. In delivering the opinion of the court, the Chief Justice observed: "There is a distinction between simple and public blockades which supports this conclusion. A simple blockade may be established by a naval officer, acting upon his own discretion or under direction of superiors, without governmental notification; while a public blockade is not only established in fact, but is notified, by the government directing it, to other governments. In the case of a simple blockade, the captors are bound to prove its existence at the time of capture; while in the case of a public blockade, the claimants are held to proof of discontinuance in order to protect themselves from the penalties of attempted violation." A like ruling was made by Sir William Scott in the case of *The Rolla*, 6 C. Rob. 364, which was the case of an American ship and cargo, proceeded against for the breach of a blockade at Montevideo, imposed by the British commander. It was argued, apparently upon the authority of *The Henrick and Maria*, 1 C. Rob. 123, that the power of imposing a blockade is altogether an act of sovereignty which cannot be assumed or exercised by a commander without special authority. But, says the learned judge: "The court then expressed its opinion that this was a position not maintainable to that extent; because a commander going out to a distant station may reasonably be supposed to carry with him such a portion of sovereign authority, delegated to him, as may be necessary to provide for the exigencies of the service upon which he is employed. On

stations in Europe, where government is almost at hand to superintend and direct the course of operations under which it may be expedient that particular hostilities should be carried on, it may be different. But in distant parts of the world it cannot be disputed, I conceive, that a commander must be held to carry with him sufficient authority to act, as well against the commerce of the enemy, as against the enemy himself, for the more immediate purpose of reduction." See also *The Johanna Maria*, Deane on Blockade, 86.

In view of the operations then being carried on for the purpose of destroying or capturing the Spanish fleet and reducing Santiago, we think it was competent for Admiral Sampson to establish a blockade there and at Guantanamo, as an adjunct to such operations. Indeed, it would seem to have been a necessity that restrictions should be placed upon the power of neutrals to carry supplies and intelligence to the enemy, as they would be quite sure to do, if their ships were given free ingress and egress from these harbors. While there could be no objections to vessels carrying provisions to the starving insurgents, if their destination could be made certain, the probabilities were that such provisions carried to a beleaguered port would be immediately seized by the enemy and used for the sustenance of its soldiers. The exigency was one which rendered it entirely prudent for the commander of the fleet to act, without awaiting instructions from Washington.

But it is contended that at the time of the capture the port of Guantanamo was completely in the possession and control of the United States, and therefore that the blockade had been terminated. It appears, however, that Guantanamo is eighteen miles from the mouth of Guantanamo Bay. Access to it is obtained either by a small river emptying into the upper bay, or by rail from Caimanera, a town on the west side of the upper bay. It seems that the *Marblehead* and the *Yankee* were sent to Guantanamo on June 7, entered the harbor and took possession of the lower bay for the use of American vessels; that the *Panther* and *Yosemite* were sent there on the 10th, and on the 12th the torpedo boat *Porter* arrived from Guantanamo with news of a land battle, and from that time the harbor was occupied by naval vessels, and by a party of marines who held the crest of a hill on the west side of the harbor near its entrance, and the side of the hill facing the harbor. But the town of Guantanamo, near the head of the bay, was still held by the Spanish forces, as were several other positions in the neighborhood. The campaign in the vicinity was in active progress, and encounters between the United States and Spanish troops were of frequent occurrence.

In view of these facts we are of opinion that, as the city of Guantanamo was still held by the Spaniards, and as our troops occupied only the mouth of the bay, the blockade was still operative as against vessels bound for the city of Guantanamo. Here again the case of *The Circassian*, 2 Wall.

135, is decisive. The Circassian was captured May 4, 1862, for an attempted violation of the blockade of New Orleans. The city, including the ports below it on the Mississippi, was captured during the last days of April, and military possession of the city taken on May first. It was held that neither the capture of the forts nor the military occupation of the city terminated the blockade, upon the ground that it applied, not to the city alone, but controlled the port, which included the whole parish of New Orleans, and lay on both sides of the Mississippi, and all the ports on that river and on the lakes east of the city. The following language of the Chief Justice is equally pertinent to this case: "Now, it may be well enough conceded that a continuous and complete possession of the city and the port, and of the approaches from the Gulf, would make a blockade unnecessary, and would supersede it. But, at the time of the capture of the Circassian there had been no such possession. Only the city was occupied, not the port, much less the district of country commercially dependent upon it, and blockaded by its blockade. Even the city had been occupied only three days. It was yet hostile; the rebel army was in the neighborhood; the occupation, limited and recent, was subject to all the vicissitudes of war. Such an occupation could not at once, of itself, supersede or suspend the blockade. It might ripen into a possession which would have that effect, and it did; but at the time of the capture it operated only in aid and completion of the naval investment." The occupation of the city terminates a blockade because, and only because, it supersedes it, and if a vessel be bound to a port or place beyond, which is still occupied by the enemy, the occupation of the mouth of the harbor does not necessarily terminate the blockade as to such places.

Granting the existence of a lawful and sufficient blockade at Guantanamo, its legal effect was a closing of the port, and an interdiction of the entrance of all vessels of whatever nationality or business. It is well described by Sir William Scott in *The Vrouw Judith*, 1 C. Rob. 126, 128, as "a sort of circumvallation round a place, by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place, and a neutral is no more at liberty to assist the traffic of exportation than of importation. The utmost that can be allowed to a neutral vessel is, that having already taken on board a cargo before the blockade begins, she may be at liberty to retire with it. But it must be considered as a rule which this court means to apply, that a neutral ship departing can only take away a cargo *bona fide* purchased and delivered, before the commencement of the blockade. If she afterwards takes on board a cargo it is a fraudulent act and a violation of the blockade." It is also said by Phillimore, 3 Int. Law, 383, that "the object of a blockade is to prevent exports as well as imports, and to

cut off all communication of commerce with the blockaded place." The sailing of a vessel with a premeditated intent to violate a blockade is *ipso facto* a violation of the blockade, and renders the vessel subject to capture from the moment she leaves the port of departure. *Yeaton v. Fry*, 5 Cranch, 335; *The Circassian*, 2 Wall. 135; *The Frederick Molke*, 1 C. Rob. 72; *The Columbia*, 1 C. Rob. 130; *The Neptunus*, 2 C. Rob. 110; Wheaton on Captures, 196. If a master have actual notice of a blockade, he is not at liberty even to approach the blockaded port for the purpose of making inquiries of the blockading vessels, since such liberty could not fail to lead to attempts to violate the blockade under pretext of approaching the port for the purpose of making such inquiries. *The Admiral*, 3 Wall. 603. *The Prize Cases*, 2 Black, 635, 677; Duer on Ins. 661; *The Cheshire*, 3 Wall. 231; *The James Cook*, Edwards 261; *The Josephine*, 3 Wall. 83; *The Spes*, 5 C. Rob. 76; *The Betsey*, 1 C. Rob. 280; *The Neptunus*, 2 C. Rob. 110; *The Little William*, 1 Acton, 141, 161; *Sperry v. Delaware Ins. Co.*, 2 Wash. C. C. 243. If there be any distinction in this particular between a proclaimed blockade and an actual blockade by a naval commander, it does not aid the Adula in view of the admitted fact that she was informed by the Vixen that the port was under the control of the United States military forces, and that the war ships were visible before she entered the bay.

In this connection we are cited by counsel for the Adula to a change in the law said to have been effected by the adhesion of this Government, at the beginning of the war, to the Declaration of Paris abolishing privateering. This supposed change apparently rests upon an extract from a French treatise upon international law by Pistoye and Duverdy, vol. 1, p. 375, in which it is said that by the modern law, in consequence of the Declaration of Paris, a vessel must be notified to depart from the blockaded port before she can be captured, and that the contrary rule was the result of the doctrine of the British Orders in Council during the Napoleonic wars, which is now given up by that country. It is also said that "the old rule was that it was a breach of blockade to enter upon a voyage to the blockaded port. This rule is now changed, because neutrals are obliged only to respect effective blockades. It may well be that a blockade of which official notice has been given is not an effective blockade, or it may be that a blockade which has been established by a sufficient force may have ceased to exist. Neutrals then have the right to begin a voyage to a blockaded port in order to see if the blockade still continues. They are only guilty when, while the blockade continues, they actually endeavor to break it."

We cannot, however, accept this opinion as overruling in any particular the prior decisions of this court in the cases above cited, to the effect that a departure for a blockaded port with intent to violate the blockade renders the vessel liable to seizure. When Congress has spoken upon this subject it

will be time enough for this court to act. We cannot change our rulings to conform to the opinions of foreign writers as to what they suppose to be the existing law upon the subject.

We have not overlooked in this connection the provision contained in Article 18 of Jay's treaty of 1794, to the effect that "whereas, it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded, or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless after notice she shall again attempt to enter." *Fitzsimmons v. Newport Ins. Co.*, 4 Cranch, 185. Waiving the question whether this clause of Jay's treaty was abrogated by the war of 1812, and accepting it as a correct exposition of the law of nations, it applies only to vessels which have sailed for a hostile port or place without knowing that the same is either besieged, blockaded, or invested. The whole case against the *Adula* depends upon the question whether those in charge of her knew before she left Kingston that Santiago and Guantanamo were blockaded. If they did, the treaty does not apply. If they did not, they are entitled to the benefit of this principle of international law. In the case of the *Maryland Ins. Co. v. Woods*, 6 Cranch, 29, in which it was held that the vessel could not be placed in the situation of one having notice of the blockade until she was warned off, the decision was placed upon the express ground that orders had been given by the British government, and communicated to our government, "not to consider blockades as existing, unless in respect to particular ports which may be actually invested, and then not to capture vessels bound to such ports, unless they shall have been previously warned not to enter them." This order was treated by the court as a mitigation of the general rule so far as respected blockades in the West Indies.

2. The questions concerning the notification of, and the intent to, violate blockade depend largely upon the same testimony, and may be properly disposed of together. . . .

From all the testimony in the case it appears very clear:

That Guantanamo was actually and effectively blockaded by orders of Admiral Sampson from June 7 until after the capture of the *Adula*;

That the *Adula* was chartered to a Spanish subject for a voyage to Guantanamo, Santiago, or Manzanillo, for the purpose of bringing away refugees, and that such voyage was primarily, at least, a commercial one for the personal profit of the charterer. During such charter she was to a certain extent, *pro hac vice*, a Spanish vessel, and a notice to Solis of the existence of the blockade was a notice to the vessel. *The Ranger*, 6 C. Rob. 126; *The Jonge Emilia*, 3 C. Rob. 52; *The Napoleon*, Blatch. Prize Cases 296. The fact of her sailing under a Spanish passport—in fact, an enemy's

license—is not devoid of significance. Indeed, we have in several cases regarded this as sufficient ground for condemnation. *The India*, 8 Cranch, 181; *The Aurora*, 8 Cranch, 203; *The Hiram*, 1 Wheat. 440; *The Ariadne*, 2 Wheat. 143. This passport gave the Adula authority to enter the Cuban ports and take away refugees, and it is a circumstance worthy of notice that it could not be found when the vessel was captured. Solis acknowledged its existence, but made no effort to account for its loss;

Both Solis himself and the Adula had been previously engaged in similar enterprises to the coast of Cuba, and were chargeable with notice, not only of war between the United States and Spain, but with the fact of military and naval operations upon the southern coast of Cuba;

The fact of such war, that the object of it was the expulsion of the Spanish forces from Cuba, and that military and naval operations were being carried on by us with that object in view, must have been matters of common knowledge in Kingston, as well as the fact that the commerce with the southern ports of Cuba was likely to be interrupted, and that all intercourse with such ports would become dangerous in consequence of such war;

While the mission of the Adula was not an unfriendly one to this Government, she was not a cartel ship, privileged from capture as such, but one employed in a commercial enterprise for the personal profit of the charterer, and only secondarily, if at all, for the purpose of humanity. Her enterprise was an unlawful one, in case a blockade existed, and both Solis and the master of the Adula were cognizant of this fact. The direction of the commanding officer of the Vixen, which overhauled the Adula off Guantanamo, to enter the harbor, cannot be construed as a permission to violate the blockade, as such permission would not be within the scope of his authority. . . .

That upon arrival off Santiago the blockading fleet was plainly visible, and we think there is a preponderance of evidence to the effect that both Solis and the master of the Adula knew of the actual blockade, that it was generally known in Kingston before she sailed, and that the Adula was chargeable with a breach of it, notwithstanding the letter of instructions from Mr. Forwood to Captain Yeates. As the blockade had been in existence since June 7 it is scarcely possible that, in the three weeks that elapsed before the Adula sailed, it should not have been known in Kingston, which was only a day's trip from the southern coast of Cuba, and with which it appears to have been in frequent communication. This probability is confirmed by the direct testimony of the sailor Morris, that it was matter of common talk in Kingston. The testimony of Solis, that he did not know "officially" that Guantanamo was blockaded, by which we are to understand that it had not been officially proclaimed, is perfectly consistent with

a personal knowledge of the actual fact. His statement seems to be little more than a convenient evasion. Upon the principle already stated his knowledge was the knowledge of the ship.

We think the facts herein stated outweigh the general statement of the officers that they had not heard of the blockade. . . .

Upon the whole, we think the decree of the District Court was correct, and it is therefore affirmed.

[The dissenting opinion of Shiras, J., concurred in by Justices Gray, White, and Peckham, is omitted.]

§ 184. AN EXAMPLE OF THE TRADITIONAL LAW OF CONTRABAND

The Carthage

TRIBUNAL OF THE PERMANENT COURT OF ARBITRATION, AWARD RENDERED

MAY 6, 1913

English text from G. G. Wilson, *Hague Arbitration Cases*, pp. 363-371.

. . . Whereas, after the Tribunal had heard the oral statements of the agents of the parties and the explanations which they furnished upon its request, the arguments were duly declared closed.

AS TO FACT

Whereas the French mail steamer "Carthage," of the Compagnie Générale Transatlantique, in the course of a regular voyage between Marseilles and Tunis, was stopped on January 16, 1912, at 6:30 A.M., in the open sea, 17 miles from the coast of Sardinia, by the torpedo destroyer "Agordat" of the Royal Italian Navy;

the commander of the "Agordat," having ascertained the presence on board the "Carthage" of an *aéroplane* belonging to one Duval, a French aviator, and consigned to his address at Tunis, declared to the captain of the "Carthage" that the *aéroplane* in question was considered by the Italian Government contraband of war;

as the transshipment of the *aéroplane* could not be made, the captain of the "Carthage" received the order to follow the "Agordat" to Cagliari, where he was detained until January 20;

AS TO LAW

Whereas, according to the principles universally acknowledged, a belligerent ship of war has, as a general rule and except for special circumstances, the right to stop in the open sea a neutral commercial vessel and to proceed to visit and search it to assure himself whether it is observing the rules of neutrality, especially as to contraband;

Whereas, on the other hand, as the legality of every act going beyond the limits of visit and search depends upon the existence either of contraband trade or of sufficient reasons to believe that there is such,

as, in this respect, it is necessary to confine oneself to reasons of a juridical nature;

Whereas in this case, the "Carthage" was not only stopped and visited by the "Agordat"; but also taken to Cagliari, sequestrated and detained for a certain time, after which it was released by administrative authority;

Whereas the end sought by the measures taken against the French mail steamer was to prevent the transportation of the aéroplane belonging to one Duval, and shipped on the "Carthage" to the address of this same Duval at Tunis;

as this aéroplane was considered by the Italian authorities as contraband of war, both by its nature and by its destination, which in reality might have been for the Ottoman forces in Tripolitana;

Whereas, in so far as concerns the hostile destination of the aéroplane, an essential element of its seizability,

as the information possessed by the Italian authorities was of too general a nature and had too little connection with the aéroplane in question to constitute sufficient juridical reasons to believe in any hostile destination whatever and, consequently, to justify the capture of the vessel which was transporting the aéroplane;

as the despatch from Marseilles, regarding certain remarks made by the mechanician of Mr. Duval, did not reach the Italian authorities until after the "Carthage" had been stopped and conducted to Cagliari and could not, therefore, have caused these measures; as, moreover, the despatch could not in any case afford a sufficient reason, in the light of what has previously been said;

Whereas, this conclusion being reached, it is not for the Tribunal to inquire whether or not the aéroplane should by its nature be included in articles of contraband, either conditional or absolute, or even to examine whether the theory of continuous voyage should or should not be applicable in this case;

Whereas the Tribunal finds it likewise superfluous to examine whether there were, at the time of the measures taken against the "Carthage," irregularities of form, and if, in case of an affirmative reply, these irregularities were of a kind to vitiate measures otherwise legal;

Whereas the Italian authorities demanded the surrender of the mail only that it might be forwarded to its destination as quickly as possible,

as this demand, which apparently was at first misunderstood by the captain of the "Carthage," was, according to the Convention of October 18, 1907, *relative to certain restrictions on the exercise of the right of capture*, which, however, was not ratified by the belligerents.

Upon the request to the effect that the Royal Italian Government be condemned to pay to the Government of the French Republic as compensation:

1. The sum of *one franc* for the offense offered the French flag;
2. The sum of one hundred thousand francs as reparation for the moral and political injury resulting from the failure to observe international common law and conventions reciprocally binding upon France and upon Italy,

Whereas, in case a Power should fail to fulfil its obligations, whether general or special, to another Power, the statement of this fact, especially in an arbitral award, constitutes already a serious penalty;

as this penalty is made heavier, if there be occasion, by the payment of compensation for material losses;

as generally and excluding special circumstances, these penalties appear to be sufficient;

as, also, the imposition of other pecuniary penalty appears to be superfluous and to go beyond the purposes of international jurisdiction;

Whereas, by the application of what has just been said, the circumstances of the present case would not justify such a supplementary penalty; as, without further examination, there is no occasion to comply with the above-mentioned request.

Upon the request of the French agent to the effect that the Italian Government be condemned to pay the sum of five hundred and seventy-six thousand seven hundred and thirty-eight francs, twenty-three centimes, the total amount of the losses and damages claimed by private parties interested in the vessel and its voyage,

Whereas the request for indemnity is, in principle, justified;

Whereas the Tribunal, after having heard the concurring explanations of two of its members, charged by it to proceed to an investigation of the said claims, has fixed at seventy-five thousand francs, the amount of indemnity due the Compagnie Générale Transatlantique, at twenty-five thousand francs the amount of indemnity due the aviator Duval and his associates, and finally, at sixty thousand francs the amount due together to the passengers and shippers; or a total of one hundred and sixty thousand francs to be paid by the Italian Government to the French Government.

FOR THESE REASONS

The Arbitral Tribunal

Declares and pronounces as follows:

The Italian naval authorities were not within their rights in proceeding, as they did, to the capture and temporary seizure of the French mail steamer "Carthage."

The Royal Italian Government shall be obliged, within three months

from the present award, to pay to the Government of the French Republic the sum of one hundred and sixty thousand francs, the amount of the losses and damages sustained by the private parties interested in the vessel and its voyage, by reason of the capture and seizure of the "Carthage."

There is no reason to comply with the other claims contained in the motions of the two parties.

Done at The Hague, in the building of the Permanent Court of Arbitration, May 6, 1913.

President:

Hj. L. HAMMARSKJÖLD

Secretary-General:

MICHIELS VAN VERDUYNEN

Secretary:

RÖELL

§ 185. ULTIMATE DESTINATION, 1915

The *Kim* illustrates an extreme use made during the World War of 1914 of the doctrine of ultimate destination in connection with contraband. Compare its doctrine with that in the Declaration of London (§ 181, above), and that of the *Peterhoff* (§ 182, above).

The *Kim*

GREAT BRITAIN, ADMIRALTY DIVISION (IN PRIZE) OF THE HIGH COURT OF JUSTICE,
1915

L. R. [1915] P. 215.

THE PRESIDENT (SIR SAMUEL EVANS): The cargoes which have been seized, and which are claimed in these proceedings, were laden on four steamships belonging to neutral owners, and were under time charters to an American corporation, the Gans Steamship Line. . . .

The four ships [three Norwegian; the *Fridland*, Swedish] . . . all started within a period of three weeks in October and November, 1914, on voyages from New York to Copenhagen with very large cargoes of lard, hog and meat products, oil stocks, wheat and other foodstuffs; two of them had cargoes of rubber, and one of hides. They were captured on the high seas, and their cargoes were seized on the ground that they were conditional contraband, alleged to be confiscable in the circumstances, with the exception of one cargo of rubber which was seized as absolute contraband.

The Court is now asked to deal only with the cargoes. All questions relating to the capture and confiscability of the ships are left over to be argued and dealt with hereafter. . . .

Before proceeding to state the result of the examination of the facts relative to the respective cargoes and claims, a general review may be made of the situation which led up to the dispatch of the four ships with their cargoes to a Danish port.

Notwithstanding the state of war, there was no difficulty in the way of neutral ships trading to German ports in the North Sea, other than the perils which Germany herself had created by the indiscriminate laying and scattering of mines of all descriptions, unanchored and floating outside territorial waters in the open sea in the way of the routes of maritime trade, in defiance of international law and the rules of conduct of naval warfare, and in flagrant violation of the Hague Convention to which Germany was a party. Apart from these dangers neutral vessels could have, in the exercise of their international right, voyaged with their goods to and from Hamburg, Bremen, Emden, and any other ports of the German Empire. There was no blockade involving risk of confiscation of vessels running or attempting to run it. Neutral vessels might have carried conditional and absolute contraband into those ports, acting again within their rights under international law, subject only to the risk of capture by vigilant warships of this country and its allies. But the trade of neutrals—other than the Scandinavian countries and Holland—with German ports in the North Sea having been rendered so difficult as to become to all intents impossible, it is not surprising that a great part of it should be deflected to Scandinavian ports from which access to the German ports in the Baltic and to inland Germany by overland routes was available, and that this deflection resulted, the facts universally known strongly testify. The neutral trade concerned in the present cases is that of the United States of America; and the transactions which have to be scrutinized arose from a trading, either real and bona fide, or pretended and ostensible only, with Denmark, in the course of which these vessels' sea voyages were made between New York and Copenhagen.

Denmark is a country with a small population of less than three millions; and is, of course, as regards foodstuffs, an exporting, and not an importing, country. Its situation, however, renders it convenient to transport goods from its territory to German ports and places like Hamburg, Altona, Lübeck, Stettin, and Berlin.

The total cargoes in the four captured ships bound for Copenhagen within about three weeks amounted to 73,237,796 lbs. in weight. . . . Portions of these cargoes have been released, and other portions remain unclaimed. The quantity of goods claimed in these proceedings is very large. Altogether the claims cover 32,312,479 lbs. (exclusive of the rubber and hides). The claimants did not supply any information as to the quantities of similar products which they had supplied or consigned to Denmark previous to the war. Some illustrative statistics were given by the Crown,

with regard to lard of various qualities, which are not without significance, and which form a fair criterion of the imports of these and like substances into Denmark before the war; and they give a measure for comparison with the imports of lard consigned to Copenhagen after the outbreak of war upon the four vessels now before the Court.

The average annual quantity of lard imported into Denmark during the three years 1911-1913 from all sources was 1,459,000 lbs. The quantity of lard consigned to Copenhagen on these four ships alone was 19,252,000 lbs. Comparing these quantities, the result is that these vessels were carrying towards Copenhagen within less than a month more than thirteen times the quantity of lard which had been imported annually to Denmark for each of the three years before the war.

To illustrate further the change effected by the war, it was given in evidence that the imports of lard from the United States of America to Scandinavia (or, more accurately, to parts of Europe other than the United Kingdom, France, Belgium, Germany, the Netherlands, and Italy) during the months of October and November, 1914, amounted to 50,647,849 lbs. as compared with 854,856 lbs. for the same months in 1913—showing an increase for the two months of 49,792,993 lbs.; or in other words the imports during these two months in 1914 were nearly sixty times those for the corresponding months of 1913.

One more illustration may be given from statistics which were given in evidence for one of the claimants (Hammond & Co. and Swift & Co.): In the five months August-December, 1913, the exports of lard from the United States of America to Germany were 68,664,975 lbs. During the same five months in 1914 they had fallen to a mere nominal quantity, 23,800 lbs. On the other hand, during those periods, similar exports from the United States of America to Scandinavian countries (including Malta and Gibraltar, which would not materially affect the comparison) rose from 2,125,579 lbs. to 59,694,447 lbs. These facts give practical certainty to the inference that an overwhelming proportion (so overwhelming as to amount to almost the whole) of the consignments of lard in the four vessels we are dealing with was intended for, or would find its way into, Germany. These, however, are general considerations, important to bear in mind in their appropriate place; but not in any sense conclusive upon the serious questions of consecutive voyages, of hostile quality, and of hostile destination, which are involved before it can be determined whether the goods seized are confiscable as prize. . . .

[The learned judge then found that the great bulk of the cargoes had been shipped "to order" or to the shippers' agents.]

With regard to the general character of the cargoes, evidence was given by persons of experience that all the foodstuffs were suitable for the

use of troops in the field; that some, e.g., the smoked meat or smoked bacon, were similar in kind, wrapping, and packing to what was supplied in large quantities to the British troops, and were not ordinarily supplied for civilian use; that others, e.g., canned or boiled beef in tins, were of the same brand and class as had been offered by Armour & Co. for the use of the British forces in the field; and that the packages sent by these ships could only have been made up for the use of troops in the field. As against this, there was evidence that goods of the same class had been ordinarily supplied to and for civilians.

As to the lard, proof was given that glycerine (which is in great demand for the manufacture of nitro-glycerine for high explosives) is readily obtainable from lard. Although this use is possible, there was no evidence before me that any lard had been so used in Germany; and I am of opinion that the lard comprised ought to be treated upon the footing of foodstuffs only. It is largely used in German army rations.

As to the fat backs (of which large quantities were shipped), there was also proof that they could be used for the production of glycerine. . . . In fact no evidence . . . was offered for the shippers of fat backs. Mr. Nuttall, a deponent for one of them . . . says the fat backs shipped by them were not in a condition which was suitable for eating; but he may have meant only that they required further treatment before they became edible.

There was no market for these fat backs in Denmark. The Procurator-General deposed as a result of inquiries that the Germans were very anxious to obtain fat backs merely for the glycerine they contain. In these circumstances it is not by any means clear that fat backs should be regarded merely as foodstuffs in these cases, and in the absence of evidence to the contrary, it is fair to treat them as materials which might either be required as food, or for the production of glycerine.

The convenience of Copenhagen for transporting goods to Germany need hardly be mentioned. It is in evidence that the chief trade between Copenhagen and Germany since the war was through Lübeck, Stettin, and Hamburg.

The sea-borne trade of Lübeck has increased very largely since the war. It was also sworn in evidence that Lübeck was a German naval base. Stettin is a garrison town, and is the headquarters of army corps. It has also ship-building yards where warships are constructed and repaired. It is Berlin's nearest seaport. It will be remembered that one of the big shipping companies asked a Danish firm to become nominal consignees for goods destined for Stettin. Hamburg and Altona had ceased to be the commercial ports dealing with commerce coming through the North Sea. They were headquarters of various regiments. Copenhagen is also a convenient port

for communication with the German naval arsenal and fortress of Kiel and its canal, and for all places reached through the canal. These ports may properly be regarded, in my opinion, as bases of supply for the enemy, and the cargoes destined for these might on that short ground be condemned as prize; but I prefer, especially as no particular cargo can definitely be said to be going to a particular port, to deal with the cases upon broader grounds.

Before stating the inferences and conclusions of fact, it will be convenient to investigate and ascertain the legal principles which are to be applied according to international law, in view of the state of things as they were in the year 1914.

While the guiding principles of the law must be followed, it is a truism to say that international law, in order to be adequate, as well as just, must have regard to the circumstances of the times, including "the circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it:" vide *The Jonge Margaretha* (1799), 1 C. Rob. 189; and Chancellor Kent's Commentaries, p. 139.

Two important doctrines familiar to international law come prominently forward for consideration: the one is embodied in the rule as to "continuous voyage," or continuous "transportation"; the other relates to the ultimate hostile destination of conditional and absolute contraband respectively.

The doctrine of "continuous voyage" was first applied by the English Prize Courts to unlawful trading. There is no reported case in our Courts where the doctrine is applied in terms to the carriage of contraband; but it was so applied and extended by the United States Courts against this country in the time of the American Civil War; and its application was acceded to by the British Government of the day; and was, moreover, acted upon by the International Commission which sat under the Treaty between this country and America, made at Washington on May 8, 1871, when the commission, composed of an Italian, an American, and a British delegate, unanimously disallowed the claims in *The Peterhoff* (1866), 5 Wall. 28, which was the leading case upon the subject of continuous transportation in relation to contraband goods. (The other well known American cases—e.g., *The Stephen Hart*, Blatch. Pr. Cas. 387, *The Bermuda* (1865) 3 Wall. 514, and *The Springbok* (1866) 5 Wall. 1—considered and applied the doctrine in relation to attempted breaches of the blockade.)

I am not going through the history of it, but the doctrine was asserted by Lord Salisbury at the time of the South African war with reference to German vessels carrying goods to Delagoa Bay, and as he was dealing with Germany, he fortified himself by referring to the view of Bluntschli as the true view as follows: "If the ship or goods are sent to the destination

of a neutral port only the better to come to the aid of the enemy, there will be contraband of war, and confiscation will be justified."

It is essential to appreciate that the foundation of the law of contraband, and the reason for the doctrine of continuous voyage which has been grafted into it, is the right of a belligerent to prevent certain goods from reaching the country of the enemy for his military use.

Neutral traders, in their own interest, set limits to the exercise of this right as far as they can. These conflicting interests of neutrals and belligerents are the causes of the contests which have taken place upon the subject of contraband and continuous voyages.

A compromise was attempted by the London Conference in the unratified Declaration of London. The doctrine of continuous voyage or continuous transportation was conceded to the full by the conference in the case of absolute contraband, and it was expressly declared that "it is immaterial whether the carriage of the goods is direct, or entails transshipment, or a subsequent transport by land."

As to conditional contraband, the attempted compromise was that the doctrine was excluded in the case of conditional contraband, except where the enemy country had no seaboard. As is usual in compromises, there seems to be an absence of logical reason for the exclusion. If it is right that a belligerent should be permitted to capture absolute contraband proceeding by various voyages or transport with an ultimate destination for the enemy territory, why should he not be allowed to capture goods which, though not absolutely contraband, become contraband by reason of a further destination to the enemy Government or its armed forces? And with the facilities of transportation by sea and by land which now exist the right of a belligerent to capture conditional contraband would be of a very shadowy value if a mere consignment to a neutral port were sufficient to protect the goods. It appears also to be obvious that in these days of easy transit, if the doctrine of continuous voyage or continuous transportation is to hold at all, it must cover not only voyages from port to port at sea, but also transport by land until the real, as distinguished from the merely ostensible, destination of the goods is reached.

In connection with this subject, note may be taken of the communication of January 20, 1915, from Mr. Bryan, as Secretary of State for the United States Government, to Mr. Stone, of the Foreign Relations Committee of the Senate. It is, indeed, a State document. In it the Secretary of State, dealing with absolute and conditional contraband, puts on record the following as the views of the United States Government:—

"The rights and interests of belligerents and neutrals are opposed in respect to contraband articles and trade. . . . The record of the United States in the past is not free from criticism. When neutral, this Government

has stood for a restricted list of absolute and conditional contraband. As a belligerent, we have contended for a liberal list, according to our conception of the necessities of the case.

"The United States has made earnest representations to Great Britain in regard to the seizure and detention of all American ships or cargoes bona fide destined to neutral ports. . . . It will be recalled, however, that American Courts have established various rules bearing on these matters. The rule of 'continuous voyage' has been not only asserted by American tribunals, but extended by them. They have exercised the right to determine from the circumstances whether the ostensible was the real destination. They have held that the shipment of articles of contraband to a neutral port 'to order' (this was of course before the Order in Council of October 29), from which, as a matter of fact, cargoes had been transhipped to the enemy, is corroborative evidence that the cargo is really destined to the enemy instead of to the neutral port of delivery. It is thus seen that some of the doctrines which appear to bear harshly upon neutrals at the present time are analogous to or outgrowths from policies adopted by the United States when it was a belligerent. The Government, therefore, cannot consistently protest against the application of rules which it has followed in the past, unless they have not been practised as heretofore. . . . The fact that the commerce of the United States is interrupted by Great Britain is consequent upon the superiority of her navy on the high seas. History shows that whenever a country has possessed the superiority our trade has been interrupted, and that few articles essential to the prosecution of the war have been allowed to reach its enemy from this country." . . .

I have no hesitation in pronouncing that, in my view, the doctrine of continuous voyage, or transportation, both in relation to carriage by sea and to carriage over land, had become part of the law of nations at the commencement of the present war, in accordance with the principles of recognized legal decisions, and with the view of the great body of modern jurists, and also with the practice of nations in recent maritime warfare.

The result is that the Court is not restricted in its vision to the primary consignments of the goods in these cases to the neutral port of Copenhagen; but is entitled, and bound, to take a more extended outlook in order to ascertain whether this neutral destination was merely ostensible and, if so, what the real ultimate destination was.

As to the real destination of a cargo, one of the chief tests is whether it was consigned to the neutral port to be there delivered for the purpose of being imported into the common stock of the country. . . . [The learned judge cites *The William* (1806), 5 C. Rob., 385, and *The Bermuda* (1865), 3 Wallace, 514.]

Another circumstance which has been regarded as important in deter-

mining the question of real or ostensible destination at the neutral port was the consignment "to order or assigns" without naming any consignee.

In the celebrated case of *The Springbok* (1866), 5 Wall. 1, the Supreme Court of the United States acted upon inferences as to destination (in the case of blockade) on this very ground. . . . The same circumstance was also similarly dealt with in *The Bermuda* (1865), 3 Wall. 514, and in *The Peterhoff* (1866), 5 Wall. at p. 25; and see Blatch. Pr. Cas. 463, at p. 540.

I am not unmindful of the argument that consignment "to order" is common in these days. But a similar argument was used in *The Springbok*, *supra*, supported by the testimony of some of the principal brokers in London, to the effect that a consignment "to order or assign" was the usual and regular form of consignment to an agent for sale at such a port as Nassau. . . .

The argument still remains good, that if shippers, after the outbreak of war, consign goods of the nature of contraband to their own order without naming a consignee, it may be a circumstance of suspicion in considering the question whether the goods were really intended for the neutral destination, and to become part of the common stock of the neutral country, or whether they had another ultimate destination. Of course, it is not conclusive. The suspicion arising from this form of consignment during war might be dispelled by evidence produced by the shippers. . . .

Upon this branch of the case—for reasons which have been given when dealing with the consignments generally, and when stating the circumstances with respect to each claim—I have no hesitation in stating my conclusion that the cargoes (other than the small portions acquired by persons in Scandinavia whose claims are allowed) were not destined for consumption or use in Denmark or intended to be incorporated into the general stock of that country by sale or otherwise; that Copenhagen was not the real bona fide place of delivery; but that the cargoes were on their way at the time of capture to German territory as their actual and real destination. . . .

Having decided that the cargoes, though ostensibly destined for Copenhagen, were in reality destined for Germany, the question remains whether their real ultimate destination was for the use of the German Government or its naval or military forces.

If the goods were destined for Germany, what are the facts and the law bearing upon the question whether they had the further hostile destination for the German Government for military use?

In the first place, as has already been pointed out, they were goods adapted for such use; and further, in part, adapted for immediate warlike purposes in the sense that some of them could be employed for the pro-

duction of explosives. They were destined, too, for some of the nearest German ports like Hamburg, Lübeck, and Stettin, where some of the forces were quartered, and whose connection with the operations of war has been stated. It is by no means necessary that the Court should be able to fix the exact port: see *The Dolphin* (1863), 7 Fed. Cases, 868; *The Pearl* (1866), 5 Wall., 574; *The Peterhoff* (1866), 5 Wall., 28 at p. 59.

Regard must also be had to the state of things in Germany during this war in relation to the military forces, and to the civil population, and to the method described in evidence which was adopted by the Government in order to procure supplies for the forces.

The general situation was described by the British Foreign Secretary in his Note to the American Government on February 10, 1915, as follows:—

"The reason for drawing a distinction between foodstuffs intended for the civil population and those for the armed forces or enemy Government disappears when the distinction between the civil population and the armed forces itself disappears. In any country in which there exists such a tremendous organisation for war as now obtains in Germany, there is no clear division between those whom the Government is responsible for feeding and those whom it is not. Experience shows that the power to requisition will be used to the fullest extent in order to make sure that the wants of the military are supplied, and however much goods may be imported for civil use it is by the military that they will be consumed if military exigencies require it, especially now that the German Government have taken control of all the foodstuffs in the country."—I am not saying that the last sentence is applicable to the circumstances of this case.— . . .

"In the peculiar circumstances of the present struggle where the forces of the enemy comprise so large a proportion of the population, and where there is so little evidence of shipments on private as distinguished from Government account, it is most reasonable that the burden of proof should rest upon claimants."

It was given in evidence that about ten millions of men were either serving in the German army, or dependent upon or under the control of the military authorities of the German Government, out of a population of between 65 and 70 millions of men, women, and children. Of the food required for the population, it would not be extravagant to estimate that at least one-fourth would be consumed by these 10 million adults.

Apart altogether from the special adaptability of these cargoes for the armed forces, and the highly probable inference that they were destined for the forces, even assuming that they were indiscriminately distributed between the military and civilian population, a very large proportion would necessarily be used by the military forces. . . .

Now as to the question of the proof of intention on the part of the shippers of the cargoes.

It was argued that the Crown as captors out to show that there was an original intention by the shippers to supply the goods to the enemy Government or the armed forces at the inception of the voyage as one complete commercial transaction, evidenced by a contract of sale or something equivalent to it.

It is obvious from a consideration of the whole scheme of conduct of the shippers that if they had expressly arranged to consign the cargoes to the German Government for the armed forces, this would have been done in such a way as to make it as difficult as possible for belligerents to detect it.

If the captors had to prove such an arrangement affirmatively and absolutely, in order to justify capture and condemnation, the rights of belligerents to stop articles of conditional contraband from reaching the hostile destination would become nugatory. . . .

. . . it is not necessary that an intention at the commencement of the voyage should be established by the captors either absolutely or by inference. . . .

If at the time of the seizure the goods were in fact on their way to the enemy Government or its forces as their real ultimate destination, by the action of the shippers, whenever the project was conceived, or however it was to be carried out; if, in truth, it is reasonably certain that the shippers must have known that that was the real ultimate destination of the goods (apart of course from any genuine sale to be made at some intermediate place), the belligerent had a right to stop the goods on their way, and to seize them as confiscable goods. . . .

For the many reasons which I have given in the course of this judgment and which do not require recapitulation, or even summary, I have come to the clear conclusion from the facts proved, and the reasonable and, indeed, irresistible inferences from them, that the cargoes claimed by the shippers as belonging to them at the time of seizure were not on their way to Denmark to be incorporated into the common stock of that country by consumption, or bona fide sale, or otherwise; but, on the contrary, that they were on their way not only to German territory, but also to the German Government and their forces for naval and military use as their real ultimate destination.

To hold the contrary would be to allow one's eyes to be filled by the dust of theories and technicalities, and to be blinded to the realities of the case. . . .

§ 186. RETALIATION

The *Leonora* illustrates the extent to which British prize courts would go in holding that retaliation was a separate branch of international law governing the relations between belligerents and neutrals, a branch independent of the principles of blockade, carriage of contraband, and unneutral service.

The Leonora

GREAT BRITAIN, JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

[1919] A. C. 974.

APPEALS from decrees of the Admiralty Division (in Prize) dated April 18, 1918.

The Appellants in the two appeals were respectively the owners of the Dutch steamship *Leonora* and the owners of a cargo of coal which she was carrying when captured. The ship and cargo were seized and condemned under an Order in Council of February 16, 1917, known as the second retaliatory Order.¹ The facts appear from the judgment of their Lordships. . . .

[The arguments of Counsel are omitted.]

LORD SUMNER: The *Leonora*, a Dutch steamship bound from Rotterdam to Stockholm direct, was stopped on August 16, 1917, by His Majesty's torpedo-boat F77, outside territorial waters, and shortly after passing Ymuiden. She was taken into Harwich. Her cargo, which was neutral-owned, consisted of coal, the produce of collieries in Belgium. It was not intended that she should call at any British or Allied port, nor had any application been made on her behalf for the appointment of a British port for the examination of her cargo. Both ship and cargo were condemned, pursuant to the Order in Council, dated February 16, 1917, and both the shipowners and the cargo owners appeal.

Their Lordships are satisfied that the cargo was "of enemy origin." . . .

The appellants' main case was that the Order in Council was invalid, principally on the ground that it pressed so hardly on neutral merchants and interfered so much with their rights that, as against them, it could not be held to fall within such right of reprisal as a belligerent enjoys under the law of nations. . . .

Upon the validity of the Order in Council itself the appellants advanced a two-fold argument. The major proposition was that the Order purported to create an offence, namely, failure to call at a British or Allied port, which is unknown to the law of nations, and to impose punishment

¹ Portions of this Order are printed in a note to Chapter I of the Declaration of London (§ 181, at page 895.)—Ed.

upon neutrals for committing it; in both respects it was said that the Order is incompetent. The minor proposition was that the belligerent's right to take measures of retaliation, such as it is, must be limited, as against neutrals, by the condition that the exercise of that right must not inflict on neutrals an undue or disproportionate degree of inconvenience. In the present case various circumstances of inconvenience were relied on, notably the perils of crossing the North Sea to a British port of call, and the fact that no particular port of call in Great Britain had been appointed for the vessel to proceed to.

In *The Stigstad*, (1919) A. C. 279, their Lordships had occasion to consider and to decide some at least of the principles upon which the exercise of the right of retaliation rests, and by those principles they are bound.² In the present case, nevertheless, they have had the advantage of counsel's full re-examination of the whole subject and full citation of the authorities, and of a judgment by the President in the Prize Court, which is itself a monument of research. The case furthermore has been presented under circumstances as favourable to neutrals as possible, for the difference in the stringency of the two Orders in Council, that of 1915 and that of 1917, is marked, since in the case of the later Order the consequences of disregarding it have been increased in gravity and the burden imposed on neutrals has become more weighty. If policy or sympathy can be invoked in any case they could be and were invoked here.

Their Lordships, however, after a careful review of their opinion in *The Stigstad*, think that they have neither ground to modify, still less to

² "The seas are the highway of all, and it is incidental to the very nature of maritime war that neutrals, in using that highway, may suffer inconvenience from the exercise of their concurrent rights by those who have to wage war upon it. Of this fundamental fact the right of blockade is only an example. It is true that contraband, blockade, and unneutral service are branches of international law which have their own history, their own illustrations, and their own development. Their growth has been unsystematic, and the assertion of rights under these different heads has not been closely connected or simultaneous. Nevertheless, it would be illogical to regard them as being in themselves disconnected topics or as being the subject of rights and liabilities which have no common connexion. They may also be treated, as in fact they are, as illustrations of the broad rule that belligerency and neutrality are states so related to one another that the latter must accept some abatement of the full benefits of peace in order that the former may not be thwarted in war in the assertion and defence of what is the most precious of all the rights of nations, the right to security and independence. The categories of such cases are not closed. To deny to the belligerent under the head of retaliation any right to interfere with the trade of neutrals beyond that which, quite apart from circumstances which warrant retaliation, he enjoys already under the heads of contraband, blockade, and unneutral service, would be to take away with one hand what has formally been conceded with the other. As between belligerents acts of retaliation are either the return of blow for blow in the course of combat, or are questions of the laws of war not immediately falling under the cognizance of a Court of Prize. Little of this subject is left to Prize Law beyond its effect on neutrals and on the rights of belligerents against neutrals, and to say that retaliation is invalid as against neutrals, except within the old limits of blockade, contraband, and unneutral service, is to reduce retaliation to a mere simulacrum, the title of an admitted right without practical application or effect."—*The Stigstad*, L. R. [1919] A. C. 279, at pp. 288-289.—Ed.

doubt that opinion, even if it were open to them to do so, nor is there any occasion in the present case to embark on a general re-statement of the doctrine or a minute re-examination of the authorities.

There are certain rights, which a belligerent enjoys by the law of nations in virtue of belligerency, which may be enforced even against neutral subjects and to the prejudice of their perfect freedom of action, and this because without those rights maritime war would be frustrated and the appeal to the arbitrament of arms be made of none effect. Such for example are the rights of visit and search, the right of blockade and the right of preventing traffic in contraband of war. In some cases a part of the mode in which the right is exercised consists of some solemn act of proclamation on the part of the belligerent, by which notice is given to all the world of the enforcement of these rights and of the limits set to their exercise. Such is the proclamation of a blockade and the notification of a list of contraband. In these cases the belligerent Sovereign does not create a new offence *motu proprio*; he does not, so to speak, legislate or create a new rule of law; he elects to exercise his legal rights and puts them into execution in accordance with the prescriptions of the existing law. Nor again in such cases does the retaliating belligerent invest a Court of Prize with a new jurisdiction or make the Court his mandatory to punish a new offence. The office of a Court of Prize is to provide a formal and regular sanction of the law of nations applicable to maritime warfare, both between belligerent and belligerent and between belligerent and neutral. Whether the law in question is brought into operation by the act of both belligerents in resorting to war, as is the case with the rules of international law as to hostilities in general, or by the assertion of a particular right arising out of a particular provocation in the course of the war on the part of one of them, it is equally the duty of a Court of Prize, by virtue of its general jurisdiction as such, to provide for the regular enforcement of that right, when lawfully asserted before it, and not to leave that enforcement to the mere jurisdiction of the sword. Disregard of a valid measure of retaliation is as against neutrals just as justiciable in a Court of Prize as is breach of blockade or the carriage of contraband of war. The jurisdiction of a Court of Prize is at least as essential in the neutral's interest as in the interest of the belligerent, and if the Court is to have power to release in the interest of the one, it must also have inherent power to condemn in justice to the other. Capture and condemnation are the prescriptive and established modes by which the law of nations as applicable to maritime warfare is enforced. Statutes and international conventions may invest the Court with other powers or prescribe other modes of enforcing the law, and the belligerent Sovereign may in the appropriate form waive part of his rights and disclaim condemnation in favour of some milder sanction, such as detention. In the

terms of the present Order, which says that a vessel (par. 2) shall be "liable to capture and condemnation" and that goods (par. 3) shall be "liable to condemnation," some argument has been found for the appellants' main proposition, that the Order in Council creates an offence and attaches this penalty, but their Lordships do not accept this view. The Order declares, by way of warning and for the sake of completeness, the consequences which may follow from disregard of it; but, if the occasion has given rise to the right to retaliate, if the belligerent has validly availed himself of the occasion, and if the vessel has been encountered at sea under the circumstances mentioned, the right and duty to bring the ship and cargo before a Court of Prize, as for a justiciable offence against the right of the belligerent, has arisen thereupon, and the jurisdiction to condemn is that which is inherent in the Court. That a rebuttable presumption is to be deemed to arise under par. 1, and that a saving proviso is added to par. 2, are modifications introduced by way of waiver of the Sovereign's rights. Had they been omitted the true question would still have been the same, though arising in a more acute form, namely, does this exercise of the right of retaliation upon the enemy occasion inconvenience or injustice to a neutral, so extreme as to invalidate it as against him? In principle it is not the belligerent who creates an offence and imposes a penalty by his own will and then by his own authority empowers and directs the Court of Prize to enforce it. It is the law of nations, in its application to maritime warfare, which at the same time recognizes the right, of which the belligerent can avail himself *sub modo*, and makes violation of that right, when so availed of, an offence, and is the foundation and authority for the right and duty of the Court of Prize to condemn, if it finds the capture justified, unless that right has been reduced by statute or otherwise, or that duty has been limited by the waiver of his rights on the part of the Sovereign of the captors.

It is equally inadmissible to describe such an Order in Council as this as an executive measure of police on the part of the Crown for the purpose of preventing an inconvenient trade, or as an authority to a Court of Prize to punish neutrals for the enjoyment of their liberties and the exercise of their rights. Both descriptions, as is the way with descriptions *arguendo*, beg the question. Undoubtedly the right of retaliation exists. It is described in *The Zamora*, (1916) 2 A. C. 77; it is decided in *The Stigstad*, (1919) A. C. 279, as it had so often been decided by Sir William Scott over a century ago. It would be disastrous for the neutral, if this right were a mere executive right not subject to review in a Prize Court; it would be a denial of the belligerents' right, if it could be exercised only subject to a paramount and absolute right of neutrals to be free to carry on their trade without interference or inconvenience. This latter contention has already been

negatived in *The Stigstad*. The argument in favour of the former, drawn from the decisions of Sir William Scott, seems to their Lordships to be no less unacceptable. With the terms of the Proclamations and Orders in Council from 1806 to 1812 their Lordships are not now concerned. They were such that the decisions on them in many cases involved not merely the use of the term "blockade" but discussion of, or at least allusion to, the nature of that right. It is, however, in their opinion a mistake to argue, as has been argued before them, that in those decisions the right to condemn was deemed to arise from the fact that the cases were cases of blockade, although the occasion for the blockade was the passing of a retaliatory Order. In their opinion Sir William Scott's doctrine consistently was that retaliation is a branch of the rights which the law of nations recognizes as belonging to belligerents, and that it is as much enforceable by Courts of Prize as is the right of blockade. They find no warrant or authority for holding that it is only enforceable by them, when it chances to be exercised under the form or the conditions of a valid blockade. When once it is established that the conduct of the enemy gave occasion for the exercise of the right of retaliation, the real question is whether the mode in which it has been exercised is such as to be invalid by reason of the burden which it imposes on neutrals, a question pre-eminently one of fact and of degree.

The onslaught upon shipping generally which the German Government announced and carried out at the beginning of 1917 is now matter of history. Proof of its formidable character, if proof were needed, is to be found in a comparison between the Retaliation Orders in Council of 1915 and of 1917, and their Lordships take the recitals of the latter Order as sufficiently establishing the necessity for further invoking the right of retaliation. They address themselves accordingly to what is the real question in the present appeal, namely, the character and the degree of the danger and inconvenience to which the trade of neutrals was in fact subjected by the enforcement of that Order. They do not think it necessary to criticize theoretic applications of the language of the Order to distant seas, where the enemy had neither trade nor shipping, a criterion which was argued for, but which they deem inapplicable. Nor have they been unmindful of the fact that, to some extent, a retaliatory Order visits on neutrals the consequences of others' wrongdoing, always disputed though in the present case hardly disputable, and that the other belligerent, in his turn and also under the name of Retaliation, may impose upon them fresh restrictions, but it seems to them that these disadvantages are inherent in the nature of this established right, are unavoidable under a system which is a historic growth and not a theoretic model of perfection, and are relevant in truth only to the question of degree. Accordingly they have taken the facts as they affected the trade in which the *Leonora* was engaged, and they have

sincerely endeavoured, as far as in them lay, to view these facts as they would have appeared to fair-minded and reasonable neutrals and to dismiss the righteous indignation which might well become those who recall only the crisis of a desperate and terrible struggle.

Compliance with the requirements of the Order in Council would have involved the *Leonora* in difficulties, partly of a commercial and partly of a military character. Her voyage, and with it the ordinary expenses of her voyage, would have been enlarged, and the loss of time and possibly the length of the voyage might have been added to by the fact that no port or class of ports of call had been appointed for the purpose of the Order. Inconvenience of this character seems to be inevitable under the circumstances. In so far as it is measurable entirely in terms of money, the extra expense is such as could be passed on to the parties liable to pay freight, and neither by itself nor in connection with other and more serious matters should this kind of inconvenience be rated high.

It is important to observe that the Order does not forbid the carriage of the goods in question altogether. The neutral vessel may carry them at her peril, and that peril, so far as condemnation is concerned, may be averted if she calls at an appointed port. The shipowner, no doubt, would say that if his ship is to make the call he will never be able to ship the cargo, for its chance of escape would be but small, and that if he is to get the cargo he must risk his ship and undertake to proceed direct to her destination. The contention is less formidable than it appears to be on the surface. Their Lordships know well, and the late President with his experience knew incomparably better, with what ingenuity and artifice the origin of a cargo and every other damaging circumstance about it have been disguised and concealed where the prize of success was high and the parties concerned were unfettered by scruples and inspired by no disinterested motives. They think that the chance of escape in a British port of call must be measured against the enormous economic advantage to the enemy of carrying on this export trade for the support of his foreign exchange and the benefit of his much-needed imports, and they are convinced that the chance might well be sufficient to induce the promoters of the trade both to pay, and indeed to prepay, whatever freight the shipowner might require in order to cover extra insurance and the costs of a protracted voyage, and to give to the actual shipper such favourable terms of purchase, insurance or otherwise as would lead him to expose his cargo to the risk of detection of its origin. They are far from thinking that compliance with the Order would exclude neutrals from all the advantage of the trade. If the voyages were fewer in number they would tend to be more profitable singly, and in any case this particular traffic is but a very small part of the employment

open, and legitimately so, to neutral traders, and the risk of its loss need not be regarded as of great moment.

There is also some evidence, though it is not very clear, that Dutch municipal law forbade, under heavy penalties, that such a deviation as would be required by a call at a British port should be made by a Dutch ship which had cleared for Sweden. If, however, the Order in Council is in other respects valid, their Lordships fail to see how the rights of His Majesty under it can be diminished or the authority of an international Court can be curtailed by local rules, which forbid particular nationals to comply with the Order. If the neutral is inconvenienced by such a conflict of duty, the cause lies in the prescriptions of his own country's law, and does not involve any invalidity in the Order.

Further, it is pointed out that, with the exception of France, the other Allied Powers did not find it necessary to resort to a similar act of retaliation, and it is contended that, upon a comparison with the Order of 1915 also, the consequences involved in a disregard of the Order of 1917 were of unnecessary severity and were unjustifiable. The first point appears to be covered by the rule that on a question of policy—and the question whether the time and occasion have arisen for resort to a further exercise of the right of retaliation is essentially a question of policy—a Court of Prize ought to accept as sufficient proof the public declarations of the responsible Executive, but in any case the special maritime position of His Majesty in relation to that of his Allies affords abundant ground for refusing to regard a different course pursued by those Allies as a reason for invalidating the Order of 1917. If the second point involves, as it seems to imply, the contention that a belligerent must retaliate on his enemy, so far as neutrals are concerned, only on the terms of compensating them for inconvenience, if any is sustained, and of making it worth their while to comply with an Order which they do not find to be advantageous to their particular interests, it is inconsistent with the whole theory on which the right of retaliation is exercised. The right of retaliation is a right of the belligerent, not a concession by the neutral. It is enjoyed by law and not on sufferance; and doubly so when, as in the present case, the outrageous conduct of the enemy might have been treated as acts of war by all mankind.

Accordingly the most material question in this case is the degree of risk to which the deviation required would subject a neutral vessel which sought to comply with the Order. It is said, and with truth, that the German plan was by mine and by submarine to deny the North Sea to trade; that the danger, prospective and actual, which that plan involved must be deemed to have been real and great, or else the justification of the Order itself would fail; and that the deviation, which the *Leonora* must have undertaken, would have involved crossing and re-crossing the area of peril.

Their Lordships recall and apply what was said in *The Stigstad*, that in estimating the burden of the retaliation account must be taken of the gravity of the original offence which provoked it, and that it is material to consider not only the burden which the neutral is called upon to bear, but the peril from which, at the price of that burden, it may be expected that belligerent retaliation will deliver him. It may be—let us pray that it may be so—that an Order of this severity may never be needed and therefore may never be justified again, for the right of retaliation is one to be sparingly exercised and to be strictly reviewed. Still the facts must be faced. Can there be a doubt that the original provocation here was as grave as any recorded in history; that it menaced and outraged neutrals as well as belligerents; and that neutrals had no escape from the peril, except by the successful and stringent employment of unusual measures, or by an inglorious assent to the enslavement of their trade? Their Lordships have none.

On the evidence of attacks on vessels of all kinds and flags, hospital ships not excepted, which this record contains, it is plain that measures of retaliation and repression would be fully justified in the interest of the common good, even at the cost of very considerable risk and inconvenience to neutrals in particular cases. Such a conclusion having been established, their Lordships think that the burden of proof shifts, and that it was for the appellants to show, if they desired, that the risk and inconvenience were in fact excessive, for the matter being one of degree it is not reasonable to require that the Crown, having proved so much affirmatively, should further proceed to prove a negative and to show that the risk and inconvenience in any particular class of cases were not excessive. Much is made in the appellants' evidence of the fact that calling at a British port would have taken the *Leonora* across a German mine-field, but it is very noticeable that throughout the case the very numerous instances of losses by German action are cases of losses by the action of submarines and not by mines. The appellants filed a series of affidavits, stating in identical terms that in proceeding to a British port of call vessels would incur very great risk of attack by submarines, especially if unaccompanied by an armed escort. Of the possibility of obtaining an armed escort or other similar protection they say nothing, apparently because they never had any intention of complying with the Order in Council, and therefore were not concerned to ascertain how much danger, or how little, their compliance would really involve. Proof of the amount of danger involved in crossing the mine-field in itself is singularly lacking, but the fact is plain that after a voyage of no extraordinary character the *Leonora* did reach Harwich in safety.

Under these circumstances their Lordships see no sufficient reason why on a question of fact, as this question is, they should differ from the considered conclusion of the President. He was satisfied that the Order in

Council did not involve greater hazard or prejudice to the neutral trade in question than was commensurate with the gravity of the enemy outrages and the common need for their repression, and their Lordships are not minded to disturb his finding. The appeals accordingly fail. Their Lordships will humbly advise His Majesty that they should be dismissed with costs.

§ 187. UNNEUTRAL SERVICE

The Manouba

PERMANENT COURT OF ARBITRATION, AWARD RENDERED MAY 16, 1913

English text from G. G. Wilson, *Hague Arbitration Cases* (1915), pp. 341-351.

[The *compromis* and the motions of the two governments are omitted.]

Whereas, after the Tribunal had heard the oral statements of the agents of the parties and the explanations which they furnished at its request, the arguments were duly declared closed.

AS TO FACT

Whereas, the French mail steamer "Manouba," of the Compagnie de Navigation Mixte, in the course of a regular voyage between Marseilles and Tunis, was stopped in the neighborhood of the Island of San Pietro January 18, 1912, about eight o'clock in the morning, by the torpedo destroyer "Agordat" of the Royal Italian Navy;

Whereas, after ascertaining the presence on board the said steamer of twenty-nine Turkish passengers, suspected of belonging to the Ottoman army, the "Manouba" was, under capture, conducted to Cagliari;

Whereas, having arrived at this port on the same day, about five o'clock in the evening, the captain of the "Manouba" was summoned to deliver the above-mentioned twenty-nine passengers to the Italian authorities and as, upon his refusal, these authorities proceeded to seize the steamer;

Whereas, finally, as, upon the request of the Vice-Consul of France at Cagliari, the twenty-nine Turkish passengers were delivered on January 19 at half past four in the afternoon, to the Italian authorities, and as the "Manouba," then released, resumed its trip to Tunis on the same day at 7:20 P.M.

AS TO LAW

Whereas, if the French Government properly thought, given the circumstances under which the presence of Ottoman passengers on board the "Manouba" was described to it, that, in consideration of the promise that the character of the said passengers would be verified, the "Manouba" was

exempted from the right of visit or coercion on the part of the Italian naval authorities, it is established that in complete good faith the Italian Government did not understand the matter in that way;

as, consequently, in the absence of a special agreement between the two governments, the Italian naval authorities were able to act according to the common law;

Whereas, according to the terms of the compromis, the action taken by the Italian naval authorities includes three successive phases, to wit: the capture, the temporary seizure of the "Manouba," and the arrest of the twenty-nine Turkish passengers who were on board;

as it is fitting to examine in the first place the legality of each of these three phases, considered as separate acts and independent of the above-mentioned action as a whole;

In this order of subjects,

Whereas the Italian naval authorities had, at the time of the capture of the "Manouba," sufficient reason to believe that the Ottoman passengers who were embarked thereon were, at least in part, soldiers enlisted in the enemy's army;

as, consequently, these authorities had the right to compel their surrender;

Whereas they might for this end summon the captain to deliver them, as well as take, in case of his refusal, the measures necessary to compel him to do so, or themselves take possession of these passengers;

Whereas, on the other hand, as, even admitting that there might have been grounds for believing that the Ottoman passengers might have been considered as forming a military troop or a detachment, nothing warranted calling in question the entire good faith of the owner and of the captain of the "Manouba";

Whereas as, under these circumstances, the Italian naval authorities had not the right to capture the "Manouba" and to compel it to leave its course and follow the "Agordat" to Cagliari, unless it were for the purpose of arrest and after the captain had refused to obey a summons to surrender the Ottoman passengers;

as, no summons of that kind having been made before the capture, the act of capturing the "Manouba" and taking it to Cagliari was not legal;

Whereas, the summons made at Cagliari having been without immediate effect, the Italian naval authorities had the right to take the necessary measures of compulsion, and specifically, to detain the "Manouba" until the Ottoman passengers were surrendered;

as the seizure effected was legal only to the extent of a temporary and conditional sequestration;

Whereas, finally, as the Italian naval authorities had the right to compel the surrender and to arrest the Ottoman passengers.

As to the action as a whole,

Whereas the three phases, of which the single action provided for by the compromis is composed, should be judged by themselves, without the illegality of any one of them having influence, in this case, on the regularity of the others;

as the illegality in capture and taking of the "Manouba" to Cagliari did not vitiate the successive phases of the action;

Whereas the capture, moreover, could not be legalized by the regularity, relative or absolute, of these last phases considered separately.

Upon the request to the effect that the Royal Italian Government be condemned to pay as compensation:

1. The sum of *one franc* for the offense offered the French flag;
2. The sum of one hundred thousand francs as reparation for the moral and political injury resulting from the failure to observe the international common law and the conventions reciprocally binding upon Italy and upon France,

And upon the request to the effect that the Government of the French Republic be condemned to pay the sum of one hundred thousand francs as a penalty and reparation for the material and moral injury resulting from the violation of international law, especially in so far as concerns the right of the belligerent to verify the character of individuals suspected of being soldiers of the enemy, when found on board neutral commercial vessels,

Whereas, in case a Power has failed to fulfil its obligations, whether general or special, to another Power, the statement of this fact, especially in an arbitral award, constitutes already a severe penalty;

as this penalty is made heavier, if there be occasion, by the payment of compensation for material losses;

as generally and excluding special circumstances, these penalties appear to be sufficient;

as, also as a general rule, the imposition of other pecuniary penalty appears to be superfluous and to go beyond the objects of international jurisdiction;

Whereas, by the application of what has been said, the circumstances of the present case would not justify such a supplementary penalty; as, without further examination, there is no reason for complying with the above-mentioned requests.

Upon the request of the French agent to the effect that the Royal Italian Government be compelled to pay to the Government of the French Republic the sum of one hundred and eight thousand, six hundred and one

francs, seventy centimes, the amount of the indemnities claimed by individuals interested either in the steamer "Manouba" or in its voyage;

Whereas an indemnity is due for the delay occasioned to the "Manouba" by its unwarranted capture and its taking in to Cagliari, but as account should be taken of the delay caused by the illegal refusal of the captain to surrender the twenty-nine Turkish passengers at Cagliari, as well as the fact that the vessel was not taken entirely out of its course to Tunis;

Whereas, if the Italian naval authorities effected the seizure of the "Manouba" at the place of its temporary and conditional sequestration, which was legal, it appears that, to this degree, the interested parties have not suffered loss and damages;

Whereas, taking account of these circumstances and also of the expense incurred by the Italian Government in guarding the detained vessel, the Tribunal, after having heard the concurring explanations of two of its members charged by it to proceed to the investigation of the said claims, has fixed at four thousand francs the amount due all those interested in the vessel and its voyage.

FOR THESE REASONS

The Arbitral Tribunal

Declares and pronounces as follows:

As regards the action as a whole, covered by the first question raised by the compromis,

The different phases of this action ought not to be considered as connected with each other in the sense that the character of any one, in this case, should affect the character of the others.

As to the various phases of the said action considered separately,

The Italian naval authorities were not, in general and according to the special circumstances under which the act was committed, within their rights in proceeding, as they did, to the capture of the French mail steamer "Manouba" and in taking it to Cagliari;

When once the "Manouba" was captured and brought into Cagliari, the Italian naval authorities were, in general and according to the special circumstances under which the act was committed, within their rights in proceeding, as they did, to the momentary seizure of the "Manouba" to the extent that this seizure did not pass beyond the limits of a temporary and conditional sequestration in order to compel the captain of the "Manouba" to deliver the twenty-nine Turkish passengers who were embarked thereon.

When once the "Manouba" was captured, brought into Cagliari and seized, the Italian naval authorities were, in general and according to the

special circumstances under which the act was committed, within their rights in proceeding as they did to the arrest of the twenty-nine Ottoman passengers who were on board.

As regards the second question raised by the compromis,

The Royal Italian Government shall be held, within three months from the present award, to pay to the Government of the French Republic the sum of four thousand francs, which after deduction of the amount due the Italian Government for custody of the "Manouba" is the amount of the losses and damages sustained by the individuals interested in the vessel and its voyage, by reason of the capture of the "Manouba" and in taking it to Cagliari.

There is no reason to comply with the other claims contained in the motions of the two parties.

Done at The Hague, in the building of the Permanent Court of Arbitration, May 6, 1913.¹

President:

HJ. L. HAMMARSKJÖLD

Secretary General:

MICHIELS VAN VERDUYNEN

Secretary:

RÖELL

C. Policy of States towards Foreign Civil Wars

§ 188. HAVANA CONVENTION, 1928

The policy of one State towards a civil war in another State is not necessarily one of "traditional neutrality," nor is it even required to be a "neutral policy" in the sense of applying the same measures to both conflicting parties. Nevertheless, an outside State may at its discretion recognize the revolutionary party as belligerents (see § 32), even though it does not recognize the governing group of the belligerents as a *de facto* or *de jure* government. If it recognizes the belligerency of the revolutionary group, however, it assumes the full rights and obligations of *traditional neutrality* towards both parties in the civil war. Such was the position assumed by Great Britain, for example, in the American Civil War. (See § 139.)

Nevertheless, the Havana Convention binds the ratifying States to certain obligations in all cases of foreign civil strife, whether the belligerency of the revolutionaries is recognized or not; and it is to be strongly emphasized that these obligations are not "neutral" or impartial in character when belligerency

¹ See *Declaration of London* (§ 181, above, articles 45-47).—Ed.

is not recognized, but are designed to favor the existing recognized government as against revolutionary groups. It should be understood that, until it recognizes the belligerency of a revolutionary group, an outside State is under no obligation to be neutral. The Havana Convention embodies an obligation of the ratifying States to be partial to the recognized government. This is the policy generally pursued by outside States; but there is no rule of international law which prevents an outside State (1) from being partial to a revolutionary group, though this would ordinarily be regarded as a hostile act by the recognized government; (2) from applying equal measures of restriction to both the recognized government and a revolutionary group; on the latter case, as exemplified in American policy towards the Civil War in Spain, 1936-1939, see § 190, at page 976; (3) from adopting a "business as usual" policy. This ignores the existence of hostilities, and holds the recognized government responsible for all damages caused to the nationals of the outside State by either the recognized government or the revolutionaries. (See § 74, at page 354.)

On recognition of belligerency and admission of insurgency, see §§ 32 and 33 above.

Convention on Duties and Rights of States in the Event of Civil Strife

ADOPTED AT HAVANA, FEBRUARY 20, 1928 ¹

Hudson, *International Legislation*, IV, 2416.

[Names of States and Plenipotentiaries omitted.]

ARTICLE I. The contracting States bind themselves to observe the following rules with regard to civil strife in another one of them.

First: To use all means at their disposal to prevent the inhabitants of their territory, nationals or aliens, from participating in, gathering elements, crossing the boundary or sailing from their territory for the purpose of starting or promoting civil strife.

Second: To disarm and intern every rebel force crossing their boundaries, the expenses of internment to be borne by the State where public order may have been disturbed. The arms found in the hands of the rebels may be seized and withdrawn by the Government of the country granting asylum, to be returned, once the struggle has ended, to the State in civil strife.

Third: To forbid the traffic in arms and war material, except when intended for the Government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied.

Fourth: To prevent that within their jurisdiction there be equipped, armed or adapted for warlike purposes any vessel intended to operate in favor of the rebellion.

¹ This Convention is in force as between Brazil, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Haiti, Mexico, Nicaragua, Panama, the United States of America, and Uruguay. (As of August, 1939.) An official text is in *U. S. T. S.*, No. 814.—Ed.

ARTICLE 2. The declaration of piracy against vessels which have risen in arms, emanating from a Government, is not binding upon the other States.

The State that may be injured by depredations originating from insurgent vessels is entitled to adopt the following punitive measures against them: Should the authors of the damages be warships, it may capture and return them to the Government of the State to which they belong, for their trial; should the damage originate with merchantmen, the injured State may capture and subject them to the appropriate penal laws.

The insurgent vessel, whether a warship or a merchantman, which flies the flag of a foreign country to shield its actions, may also be captured and tried by the State of said flag.

ARTICLE 3. The insurgent vessel, whether a warship or a merchantman, equipped by the rebels, which arrives at a foreign country or seeks refuge therein, shall be delivered by the Government of the latter to the constituted Government of the State in civil strife, and the members of the crew shall be considered as political refugees.

ARTICLE 4. The present Convention does not affect obligations previously undertaken by the contracting parties through international agreements.

[Article 5, regarding ratifications, omitted.]

D. Recent "Neutral Policy" of the United States

§ 189. THE RECASTING OF NEUTRAL POLICY: MR. WARREN'S PROPOSALS

The article reprinted below is now regarded as a classic statement of the difficulties a great State like the United States has in maintaining its neutrality during a world-wide war. It also suggests possible improvements in American neutrality policies, some of which have been made in subsequent American legislation. See §§ 190-192 below.

Troubles of a Neutral

BY CHARLES WARREN, FORMERLY ASSISTANT ATTORNEY GENERAL OF THE
UNITED STATES

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Relations from *Foreign Affairs*, Vol. XII, No. 3 (April, 1934).

Americans at the present time seem determined to refrain from joining with other countries in attempts to avert war, and equally determined to

remain neutral and to keep out of any war that may occur between other countries.

Personally, I believe that the United States should not so refrain; and I fear, moreover, that it will be impossible to remain neutral in any war between Great Powers resulting from a violation of the League Covenant or of the Kellogg-Briand Pact. But so long as this country holds to the opposite view, it is of immense importance that Americans who hope to keep out of war should be made to realize the burdens which they must probably assume, and the rights which they must probably yield, in any attempt to fulfill their hope. For, in order to keep out of any future war between Great Powers, the United States must do far more than to remain technically neutral. There is no magic in the word "neutrality" as a protection to us against war. In fact, the very condition of neutrality engenders frictions which nowadays are likely eventually to implicate a powerful neutral in any war in which the Great Powers may be engaged (especially if one of those Powers happen to be a naval Power). The United States, therefore, cannot rely on neutrality alone. To the old warning, "in time of peace, prepare for war," must be added another, "in time of peace, prepare for keeping out of war." And in the present unsettled state of international affairs in the world the people of this country should now be giving serious thought to such preparation, by the immediate passage of further legislation, not merely for maintenance of our future neutrality, but for the avoidance of frictions which will otherwise inevitably grow out of that neutrality, and which, unless prevented, will inevitably drag us into the conflict. Statutes for this purpose should be enacted now, so that they may be put into active operation at once upon the outbreak of a war; for, in 1914, grave difficulties were created for our Government by the absence of Federal laws adequate to deal with the unexpected situations produced, not only by changed conditions of modern warfare, but also by hostile operations of belligerent agents and supporters on our neutral soil.

How certainly a future neutral is likely to be involved in dangerous complications with the belligerents, both with respect to obligations which international law imposes on neutrals and to rights which it confers, has been recently made clear by Mr. Lloyd George. In the second volume of his "War Memoirs" he points out that since the attitude of a belligerent is governed "by the exigencies of a deadly strife, the country which is determined at all costs to remain neutral must be prepared to pocket its pride and put up with repeated irritations and infringements of its interests by the belligerents on both sides," and "should the difficulties of neutrality prove too great, it is left with the choice of treating the violation of its rights by one of the belligerent powers as a *casus belli*." Thus, belligerent disregard of rights growing out of neutrality is very likely to drive the

neutral straight into war. And even full and rigid compliance by a neutral with its legal obligations may constitute an irritant to one or the other of the belligerents and be a means of involving it in the war; for, by reason of geographical or other conditions differently affecting opposing belligerents, an obligation imposed by international law upon a neutral frequently operates in such a way as to render a country, while technically neutral, an aid in fact to the one side as against the other.

Hence, in the future, in order to keep out of war, it will be necessary (as before stated) for the United States to do far more than merely comply with its legal obligations of neutrality. In order to avoid friction and complications with the belligerents, it must be prepared to impose upon the actions of its citizens greater restrictions than international law requires. It must also be prepared to relinquish many rights which it has heretofore claimed and asserted, and to yield to contentions by belligerents, hitherto denied by it, with respect to interference with the trade and travel of its citizens on the high seas, if the interests of the belligerents seem to them so to require.

This is not a statement of any theoretical condition; it is the necessary conclusion from what took place in the World War. The United States found that to assert neutrality by Presidential proclamation or otherwise was easy; to maintain it in face of activities of belligerents on our soil or in our waters was difficult; to preserve it against the conflicting contentions of the belligerents was practically impossible. And it must also now be borne constantly in mind that (with the exception of the existence of a statute enacted in 1917, of which I shall speak later), every condition which confronted the United States from August 1914 to April 1917 is still present or possible today. Not a single controversy which arose between our Government and the belligerent powers has been settled. Every single contention made by them respectively as to use of submarines and as to neutral rights on the high seas is still made by them. We are just where we were on April 6, 1917, so far as any agreement on what are the rights of neutrals then involved is concerned.

It so happened that from August 1914 to April 1917 I, as Assistant Attorney General of the United States, was charged with enforcing our neutrality laws and obligations and with investigating and prosecuting all hostile activities of belligerents in this country, so far as the Department of Justice was concerned. I was, therefore, placed in a position in which a clear comprehension was to be had of what steps the United States would be obliged to take in a future war, if it expected to keep out of such a war. It may be admitted that, in one respect, the United States is at present better prepared to cope with problems affecting a neutral than it was in 1914. At that time, practically no neutrality legislation had been enacted since

the year 1838; and there were few Federal criminal laws appropriate to deal with the hostile activities in which German agents and sympathizers engaged on our soil from 1914 to 1917—the manufacture of bombs and the placing of them in cargoes of sea-going vessels, the explosion and burning and attempted destruction of munition factories and manufactures of other war supplies, the interference with transportation of such supplies, the attempts to blow up canals, bridges, and other property in Canada, the furnishing of coal and other supplies to belligerent warships on the high seas through neutral ships for which clearances were obtained by false statements, the forging of United States passports, the operations of agents of the German Government in this country without notice to our State Department. These and many similar activities were entirely unanticipated, and we had no Federal criminal laws adequate to curb them. When the serious gaps in our protective statutes were finally perceived, the Attorney General of the United States directed me to draft further legislation for the better enforcement and protection of our neutral state. Eighteen proposed statutes so drafted were submitted by the Attorney General to Congress in June 1916; but they were not enacted into law until June 15, 1917 (after we had ceased to be neutral). They were then embodied in one law under the various titles and sections of the miscalled Espionage Act (an Act which was very little concerned with espionage and which was chiefly a neutrality law). With this law now in existence, a repetition of many of the hostile and criminal activities which took place here during the Great War is not to be expected; and some of the conditions will be controlled, which produced so great friction between us and Germany. But the provisions of this law cover only a limited portion of the field of legislation which the United States ought to enact now, if it hopes to avoid similar sources of friction with belligerents; and past experience amply shows that, to achieve that result, the following are some of the additional obligations and restrictions which we must assume and impose upon ourselves.

1. One of the earliest questions which the United States Government had to solve at the beginning of the Great War, in August 1914, was what to do with radio stations. As the advent of the wireless had been subsequent to any previous war, it constituted a new problem and its possible use presented conditions differing from the use of cables or telegraph. Each belligerent complained that radio stations then built or being built were or were to be owned or operated by or in the interest of the opposing belligerent. As early as August 5, 1914, and without any great degree of statutory authority, our Government felt obliged to take over a certain amount of control and censorship, because of the fact that such stations could be used as a base of operations to direct belligerent fleets on the high seas and for other belligerent purposes. Subsequent Federal legislation has increased its au-

thority, and the Government will undoubtedly find it necessary in a future war to take over control of all high power radio stations; it will also probably be obliged to prohibit transmission of any secret code or cipher message, by wireless (and possibly by cable or telegraph), even those sent by foreign diplomats, in view of experiences in the Great War with the use of such means both by diplomats of belligerents as well as of other neutral nations. It will certainly be wise to forbid the use of radio instruments by any ship in our ports or waters, as Chile, Argentina, and Norway found necessary in the Great War.

2. One of the leading sources of friction between us and Germany and Austria was the supply by citizens of this country of arms and munitions to the Allied Governments—an action permitted by international law. Germans became infuriated (and not unnaturally) when they saw, or believed they saw, their soldiers killed and wounded by American-manufactured armament. It was, however, contended by one of the belligerents that it would be unneutral in our Government, after the war began, to change the rules of the game and to then forbid such supply by our citizens; for such Government interference, it was contended, would have had the effect of deliberately favoring Germany over Great Britain, France, and Italy. On the other hand, refusal of our Government then to interfere, though strictly in compliance with the law of neutrality, did, in practice, favor the Allies over Germany, owing to the control of the seas by the former. In a future war, we should, at its very outset, forbid the supply or sale of arms and ammunition to all belligerents. It must be admitted that under present conditions, when many articles used ordinarily for commercial purposes, such as cotton, chemicals, etc., may be employed directly for war purposes, it will be very difficult to know where to draw the line on such prohibited sales, and that unless a line is drawn, such a provision might lead to a practical embargo on all trade with belligerents. It is possible, nevertheless, for practical purposes to define in a statute the words "munitions of war;" and this has been done in two carefully drawn bills introduced in 1928 by a Republican Congressman, Mr. Burton of Ohio, and by a Democratic Congressman, Mr. R. Walton Moore of Virginia, and also in a thorough opinion rendered by Attorney-General Wickersham in the Taft Administration. During the Great War, similar legislation was introduced by Senator Hitchcock of Nebraska as early as December 7, 1914, which was widely supported later throughout the country. Moreover, it is sales of such munitions as cannon, shells, explosives, bombs, machine guns, rifles, cartridges and the like, which gave rise and will give rise to the bitterest resentments by belligerents and which resentments will be obviated by the proposed legislation. It may be admitted that it will be difficult to prevent sales of munitions being made indirectly to belligerents

through agents or friendly purchasers in other neutral countries. Nevertheless, unless the attempt shall be made by us, we shall incur serious resentments, which will impair the possibility of our remaining out of the war.

3. If we are not prepared to go so far as to forbid the sale of arms and munitions to belligerents, we should at least forbid their shipment in American vessels. For, since the right claimed by Germany to employ submarine attack without warning upon vessels carrying arms and munitions of war or armed for defense has never yet been settled by any agreement of all the Great Powers, and since, therefore, such submarine attacks are practically certain to be employed in any future war, with the inevitable result of dragging this country into the war if American citizens on such ships shall be killed, it will be necessary for our Government to forbid American ships to carry arms and munitions to the belligerents. For the same reason, it will also be necessary for our Government to forbid American citizens to travel as passengers or members of the crew on any ship, whether belligerent or domestic, which shall so carry a cargo of arms or munitions. Undoubtedly the right of an American to travel on any such ship is an admitted right under international law; but unless we are prepared to go to war to maintain it, it is a right, under the present contentions as to the use of submarines, which we must be prepared to yield or restrict for the sake of remaining at peace.

4. Germany attempted to justify her method of submarine warfare by pointing out the fact that British merchant ships carried armament ostensibly for defense but which could be used for attack; and Germany has never abandoned this contention. On the other hand, the Allied Powers asserted and continue to assert their right to arm merchantmen for defense. As early as August 15, 1914, a controversy arose with our State Department as to the status of a British merchantman which had entered New York with two naval guns mounted. The subject of this controversy continued to inflame the situation through the war; it gave rise in 1916 to the Mc-Lemore Resolution. It is a most certain source for frictions. Our Government, at the outset of any future war, should forbid the entrance into our ports or waters of any commercial ship of a belligerent which is armed, whether for defense or offense, with cannon, or which has emplacements for cannon, or else it should treat such ships as auxiliary cruisers of the belligerent. The United States should also forbid American citizens to travel on such ships either as passengers or crew. It will not be wise to run the risk of another *Lusitania* complication. (While, of course, examinations before sailing and subsequent investigations by our Government officers proved conclusively that that vessel did not carry armament, yet she did carry in her cargo munitions of war classified as non-explosives, such as cartridge and unfilled shell.)

5. Since many attacks by submarines on our ships were due to the practice of British merchant vessels in flying the American flag for purposes of deception, our laws should authorize the President to forbid entrance into our ports of any ship belonging to a belligerent nation which shall permit such a practice.

6. Complications arose in the Great War by the action of a German cruiser in sending into Norfolk with a prize crew an English ship, the *Appam*, taken by it as a prize. No prize should be allowed to enter or be brought into our ports. Treaties on this subject should be revised.

7. In the Great War, our Government allowed the entry into our ports and waters of commercial submarines belonging to Germany, since international law did not require us to forbid it. Friction with supporters of the Allied cause arose. On the other hand, Norway, Sweden, and Spain forbade the use of their ports and waters by submarines of belligerents. The difficulty of any adequate supervision over the operations of submarines, whether war vessels or merchantmen, should lead our Government to debar their entrance into our ports or waters during a war. For similar reasons, aircraft of a belligerent, whether war or commercial, should be forbidden to arrive or descend within the jurisdiction of the United States or to pass over our territory.

8. German merchant ships in our ports at the beginning of the Great War became, in many instances, seats of bomb manufacture and nests of activities, criminal, and otherwise hostile to this country. Such ships in the future should be required to leave our ports within a given time after outbreak of war (unless such action should be violative of treaty obligations), and if they shall choose to remain in our ports, they should be taken into the custody and control of our Government during the war (not for use by our Government, but for safekeeping and preventive purposes) or until such time as they shall desire to clear from our ports.

9. One serious source of irritation, as to which frequent charges were made by both belligerents against our Government for alleged violations of our duties as a neutral, was the use of our ports as a base of supplies to send out ships carrying food, coal, and other supplies to belligerent warships on the high seas. As a matter of fact, our Government exercised the fullest diligence and care to comply with its neutral obligations by preventing such use, wherever it had or could obtain knowledge; but fraud and deceit by belligerent agents made our efforts to some extent ineffectual. Early in the war, charges by the German Ambassador that New York was supplying British warships off the port were investigated by us and found baseless. On the other hand, after long, patient, and difficult investigation, we found ample evidence of the still earlier sending out of ships from New York, San Francisco, and other ports, by German agents to supply coal

to German warships. At first, we had no Federal statutes sufficient to deal with the situation; but we did indict and convict certain German corporations and individuals here for false statements in papers submitted by them to this Government in connection with clearances. In 1915, Congress authorized the President to refuse clearance to any ship which he had cause to believe was to constitute such a supply ship to a belligerent. The Act of June 15, 1917, gave still further authority to our Government. Even more stringent legislation, however, may be necessary in any future war. How deeply the fortunes of a belligerent may be involved may be seen from the fact that two American ships controlled by Germany which were cleared from San Francisco, in the fall of 1914, by means of false statements as to their destination, actually supplied coal to the German cruisers *Dresden* and *Leipzig* which made possible the defeat of the British fleet in the battle off Coronel. It may be wise to consider seriously the advisability of granting to the President authority to forbid the entrance into our ports and waters of any ship of a belligerent nation which shall have violated or may violate in the future the laws of neutrality or our statute laws. We should also consider the advisability of forbidding clearance to any ship, domestic or foreign, owned by a corporation or individual which shall have committed such a violation. Argentina and Chile took action along these lines; and it is interesting to note that, in 1915, Brazil even went so far as to authorize taking over the ships of its national merchant marine "in order to avoid international frictions which might compromise the cordiality of the relations of perfect friendship in which fortunately we live with other peoples."

10. Considerable controversy arose in the Great War between our Government and Italy and Great Britain over the status of merchant ships of the latter two countries which had been chartered, requisitioned, or otherwise officially controlled by the respective Governments. The status of these ships raised a question whether they should not be considered as supply ships of the belligerent navies. To avoid any dispute in the future, our Government should announce its intention, at the outset of any war, to treat such ships as adjuncts of the belligerent navies, and subject to internment under international law if they shall remain in our neutral waters longer than the time prescribed by such law for belligerent war vessels.

11. A leading source of friction in the Great War was the public floating of loans in this country by belligerent Governments. International law, while forbidding loans by neutral Governments to belligerents, allows such loans to be made by private citizens of neutral countries. To avert frictions and resentments, such loans should in the future be forbidden. Moreover, the possibility of pressure being brought by our own citizens upon our Government to enter the war on the side of a belligerent to whom the bulk of such loans shall have been made is such as to render it

desirable to prevent such a condition from arising. Denmark in the Great War, it may be noted, penalized any person inviting participation in a state loan of a belligerent. It is true that prohibition of such public loans would not prevent private loans for the financing of commercial transactions of the belligerents; and it is also true that such commercial loans constituted the bulk of the financing for the belligerents in this country in the Great War; and it is further true that to interfere with private loans for commercial financing would produce too great a commercial loss to our citizens to be readily endured by them. But, while the limited legislation above suggested would not and could not prevent all resentments, it would mitigate the situation. Moreover, if the suggested legislation as to prohibition of sale of arms and munitions to belligerents should be adopted, a great part of the commercial financing would disappear from the picture.

12. Considerable friction arose in the Great War between Great Britain and this country owing to the unequal action of our neutrality statute which forbids enlistment in this country in the forces of a belligerent. When we indicted and convicted British officials here of violating this statute, the British Ambassador violently complained that we did not take similar action against German and Austrian officials. But, as decided by our courts, the British actions constituted in fact a violation of our enlistment law; whereas, since all German and Austrian reservists in this country were already on the army lists of their respective countries, their assembly here and dispatch abroad did not fall within the meaning of the word "enlist" used in our law. To avoid this source of friction, we should forbid both kinds of action by belligerents in this country, regardless of the technical meaning of "enlistment." The evil is equally great to us, whether agents of a belligerent gather together in this country either new recruits or reservists.

Hostile sentiment towards this country during the Great War was further aroused in the belligerent countries by the extent to which American citizens enlisted in belligerent armies, notably in the French and Canadian forces. Nothing in the law of neutrality forbids such action; but its allowance by a neutral country is certain to excite resentment. Denmark wisely made it a crime for one of its citizens "to take service in the armed forces of any belligerent." This country might profitably enact similar legislation in any future war.

Most of the above provisions must be embodied in legislation which shall operate at once upon the outbreak of another war, if we are to avoid being forced into future wars between Great Powers owing to inevitable frictions aroused by our neutral position; and much of such legislation should preferably take the form of authorization of the President to put in force all or any of the prohibitions provided for.

Up to this point, however, the chief source of inevitable entanglement in a war under modern conditions has not been mentioned, *viz.*, the assertion and attempted enforcement by our Government of alleged rights of trade belonging to our citizens as neutrals. If, in the future, we intend to insist on the alleged rights for which we persistently contended from 1914 to 1917, then there is little likelihood that we can avoid entering a war, on the one side or the other. For these alleged rights, at the present time, are "rights" only in name. They are a legal fiction.

It is possible that, prior to 1914, international law and law-books did recognize certain rights to trade as belonging to neutrals. But with the advent and progress of the Great War those rights were swept aside; and today the belligerents then engaged have not conceded any right which they denied from 1914 to 1917. Beginning with the first week of August 1914, and continuing up to our entry into the War, there was a series of acts by Great Britain, France, Italy, and Germany, every one of which was challenged by our Government as a violation of our neutral rights: the sowing of mines on the high seas; the extensive and unreasonable sea zones involving danger to neutrals; the destruction of neutral ships captured in midocean; the unwarned sinking by submarines of neutral ships and of belligerent merchant ships on which neutrals were rightfully travelling; the forcing of our ships and of our mails into belligerent ports for the purposes of search, seizure, and censorship; the extension of contraband to cover foods and supplies to civil populations; the stoppage of our ships on the high seas for the purpose of taking persons off them. Secretaries of State Bryan and Lansing constantly protested all these actions, as contrary to international law. Nevertheless, on April 6, 1917, when the United States entered the war, not one of our contentions had been accepted by the belligerents; not one neutral right asserted by us had been granted by them as a right, though a few of our protests (notably against taking men off our ships) had been acceded to as a favor. After the war, neither the United States, nor other neutrals like Holland, Sweden, or Norway, took effective action to submit their claims of violation of neutral rights to arbitration in order to determine whether any such rights were in existence. On the contrary, at the end of ten years from our entrance into the war, on May 19, 1927, Secretary of State Kellogg exchanged notes with Great Britain, deliberately giving up any attempt to ascertain the validity of our claims of violation of neutral rights by Great Britain from 1914 to 1917, and waiving the presentation of any diplomatic request for international arbitration of our claims, though saving the right (which right, of course, we would have had as a sovereign nation, without any such reservation) "to maintain in the future such position as it may deem appropriate with respect to the legality or illegality under international law" of the measures adopted dur-

ing the war. So far as Germany is concerned, our dispute with her as to the legality of her use of submarines has never been settled, judicially or otherwise; and the treaty of February 6, 1922, framed at the Washington Conference for the Limitation of Armaments prohibiting the use of submarines as commerce destroyers has not been ratified by all its signers, and was not even signed by Germany.

Hence, the situation confronting the United States today is that not a single neutral right of trade asserted by us is recognized officially by Great Britain, France, Italy, or Germany to any greater extent than it was between August 1914 and April 1917.

What is the use of talking about neutral "rights," in view of such a situation? Of course, I do not mean to say that there are not many neutral rights which a nation, as a nation, still possesses and which are universally recognized; but it is evident that the citizens of a neutral nation do not now possess any rights on the high seas which can be successfully asserted against a belligerent without danger of such assertion leading to war. The fact is—and we must face it without deluding ourselves with international law as it exists in books—it is perfectly clear that, in any future war between Great Powers, each belligerent will deal with neutral trade in whatever manner may seem necessary to it in order to achieve victory—unless the danger of forcing the neutral to join in the war against it shall appear to it to counterbalance the advantage of such a policy. In other words, the neutral will be allowed just such privileges of trade, and only those privileges, which the belligerent believes will not impair too seriously its chance of winning the war.

The doctrine which was announced by both Great Britain and by Germany in many notes addressed to the United States from 1914 to 1917, to the effect that illegal interference with neutrals by the one justified equally illegal interference by the other, *i.e.*, the so-called right of retaliation, entirely ignores the existence of any such thing as a neutral right of trade. Yet this doctrine has been upheld by the English courts and by their prominent writers on international law. Thus, the Earl of Birkenhead, in his book on the subject, in 1927, defended the British reprisals as measures adopted in pursuance of the highest duty "to obey the law of self preservation," and, said he, "all the measures adopted may not be generally acceptable [to neutrals] but the broad policy pursued, it may be safely predicted, will be followed in another war by any naval belligerent to the fullest extent compatible with continued diplomatic relations with neutral States." And even an American naval officer in a treatise for the use of our navy, wrote in 1928: "It is generally recognized that a belligerent is entitled to prevent neutral commerce that will aid the enemy in prosecuting the war from reaching the enemy *via any route*. . . . To allow this commerce to proceed,

when a belligerent has the power to stop it, may result in the loss of the war by such belligerent." And Mr. Lloyd George, in the second volume of his "War Memoirs," in describing the British relations with the United States, says very plainly that while neutrals during a war, "earn greater profits, they are subject to greater hazards and less consideration. Nations fighting for their lives cannot always pause to observe punctilios. Their every action is an act of war, and their attitude to neutrals is governed, not by the conventions of peace, but by the exigencies of a deadly strife."

In any future war, therefore, it will be wise for our Secretaries of State to cease using the words "neutral rights of trade." If we continue to contend for such "rights," we will inevitably be implicated in the war.

It behooves our Government, moreover (and in fact any Government), to be extremely cautious about inspiring in its citizens a belief in the existence of a "right." Men are often more influenced by their beliefs as to a fact than by the fact itself. Inculcation of a belief in a "right" is an inflammatory act. For instance, the interference with American trade by Great Britain from 1914 to 1917 would not, by itself, have produced such hostile sentiment here, if such interference had not been so continuously represented to the public by our Government as a violation of fixed, unchallengeable rights which our citizens possess as neutrals under international law. The President and his Secretaries of State were undoubtedly justified at that time in employing the term "rights," because it was then supposed that they existed under international law. (It is unnecessary to consider whether we were correct in all of our contentions, but certainly *some* such rights were considered as established.) But now, in view of our past experience, discontinuance of the use of the inflammable words "rights of trade" in diplomatic correspondence will be one of the chief factors in helping a neutral to remain neutral.

In order to avoid this risk of becoming engaged in the war for the vindication of so illusory a thing as a "neutral right of trade," the sane policy for us would be, at the outset of any war between great powers, to admit frankly that, whether or not "rights" exist in law, it is impracticable to assert them successfully during the war, and that it is impracticable to wrest admission of them from a belligerent. Recognizing, realistically, that a belligerent will concede only such privileges to trade as it believes compatible with its own victory, the President of the United States should enter into negotiations with both belligerents at the outset of the war to obtain by informal agreement or convention the utmost concession or the best *modus vivendi* for the trade of our citizens; and in such negotiations valuable and persuasive arguments would be available to him, if there should then be on the Federal statute books the legislation above suggested, vesting in the President powers to be exercised at his discretion in any war

in which the United States shall be neutral. The fear, expressed by some, that concessions to a neutral by one belligerent might be resented by the other belligerent seems ill-founded; for the United States would offer to both belligerents the opportunity to make such concessions, and the belligerent failing to make them could hardly be in a position to complain. Belligerents, moreover, can often afford to concede to a neutral, as a practicable arrangement of trade in a given situation, that which they will not concede as a right. There is too much talk in international affairs about rights and too little about adjustments. Harping on rights leads to arrival at positions from which a nation cannot withdraw or yield; it leads to ultimatum which inevitably lead to war.

If a President of the United States shall not be able to obtain concessions from belligerents, by agreement, he will have four courses which he can pursue, if belligerents continue to interfere with our citizens on the high seas. (And it is to be borne in mind that in the conduct of our foreign relations, the President has sole power to act, so far as the situation is such as not to require a treaty or legislation.)

- a. He can decide that no right of neutrals exists.
- b. He can decide that a right exists but that it has not been violated.
- c. He can decide that a right exists which has been violated and which is of sufficient importance to lay before Congress as the *casus belli*.
- d. He can decide that a right exists and has been violated but that he will not consider it wise, under the circumstances, to press it until the conclusion of the war.

It is for the President alone to make such a choice. Neither the Senate nor Congress can control his choice of policy, unless Congress shall decide, independently, to declare war. It is to be hoped that so far as neutral rights of trade are concerned, a President will make the fourth choice. It is better that our citizens should run the risk of commercial loss than that the country should be involved in a war to protect their alleged commercial rights. And indeed, there are many men in this country who believe that our citizens, travelling on the high seas in time of war, should do so at their own risk. Such a policy on the part of our Government would not entirely wreck our foreign trade, as some writers fear; for as a matter of fact, in the Great War, the profits from our trade with or for the benefit of the belligerents were so great that many American citizens would have continued to engage in that trade, as a speculation, regardless of the fact whether or not their right to do so was asserted by our Government or denied by any opposing belligerent. While it may not be desirable for our Government to take any legislative step either to protect or to prevent such trade (other than to prohibit trade in munitions of war, as specifically defined by statute), our Government may very properly say, in effect, to

its citizens during the war: you engage in such trade at your own risk during the existence of the war, and you can protect your trade by requiring a profit correlative to the risk. If our Government should adopt this policy and its claim for violated rights should be upheld by any international tribunal after the war, and if the violating belligerent nation should not be able to pay, it would be far cheaper for this country to assume payment of all such claims of its citizens than to join in the war on the side of the one or the other belligerent, to enforce them.

Finally, even if all the above precautions shall be taken by this country to avoid being dragged into war, there will still exist in this country of mixed population the ever-present danger of becoming involved in war, through inflammatory propaganda in the public press and on the public platform by the adherents of one belligerent against the other. Recollection of the violent activities of the pro-Ally advocates, as well as of the pro-German advocates, directed against each other in this country from 1914 to 1917, and the testimony taken before the Overman Committee in 1918 as to efforts by belligerents to buy, control, or direct foreign language and other newspapers of this country, furnish clear proofs of the dangers of propaganda intended to promote the cause of one or the other belligerent within the confines of a neutral nation.

President Wilson was much assailed for his appeal to the American people of August 18, 1914, in which he said:

The people of the United States are drawn from many nations, and chiefly from the nations now at war. It is natural and inevitable that there should be the utmost variety of sympathy and desire among them with regard to the issues and circumstances of the conflict. Some will wish one nation, others another, to succeed in the momentous struggle. It will be easy to excite passion and difficult to allay it. Those responsible for exciting it will assume a heavy responsibility, responsibility for no less a thing than that the people of the United States whose love of their country and whose loyalty to its Government should unite them as Americans all, bound in honor and affection to think first of her and her interests, may be divided in camps of hostile opinion, hot against each other, involved in the war itself in impulse and opinion if not in action.

Such divisions among us would be fatal to our peace of mind and might seriously stand in the way of the proper performance of our duty as the one great nation at peace, the one people holding itself ready to play a part of impartial mediation and speak the counsels of peace and accommodation, not as a partisan, but as a friend.

I venture, therefore, my fellow countrymen, to speak a solemn word of warning to you against that deepest, most subtle, most essential breach of neutrality which may spring out of partisanship, out of passionately taking sides. The United States must be neutral in fact as well as in name during these days that are to try men's souls. We must be impartial in thought as well as action,

must put a curb upon our sentiments as well as upon every transaction that might be construed as a preference of one party to the struggle before another.

The President was moved to issue this early appeal because of the rather blatant attempts by German sympathizers here at the very outset of the Great War to rouse this country against the Allies. (It is interesting to recall the much overlooked fact that his appeal was, at the time of its issue, highly praised by both Republican and Democratic papers of prominence in the East, though attacks made later on the President for the appeal were chiefly made by advocates of the Allied cause.¹) The subsequent course of events in this country—the immoderate and illiberal attacks on the pro-Germans by the people of the East, and the equally illiberal attacks on the pro-Allies made by people in the Central West—proved how right the President had been in his effort, and what dangerous discord was produced in this country by a disregard of his wise caution. Throughout the period of our neutrality, influential magazines and newspapers, as well as speeches of public men, continually inflamed the situation and endangered the position of the country as a neutral by not merely expressing their sympathy with the one side or the other (as was perfectly right and natural), but by indulging in harsh and violent criticism and denunciations of the belligerent Governments, countries, armies, and citizens with which they were not in accord. This not only excited animosities here but aroused hot resentments in the belligerent countries. It was certain to work estrangements; and, as Senator Stone, Chairman of the Senate Foreign Relations Committee, deplored, it “made free and cordial intercourse between this Government and the Governments of the nations at war more difficult and embarrassing.”

In a future war, this unrestrained system of public attack here on one or the other of the belligerents will again be bound to excite animosities which will lead us straight into war, unless curbed or modified by ourselves or by our Government. Denmark in the Great War made it a penal offense for anyone publicly in writing or orally to “endeavor to incite the population against a belligerent.” Such legislation in this country would be inadvisable because it appears too dangerously close to an infringement of the freedom of the press. The proper position for public men and the public press in a neutral country to take voluntarily and without compulsion was finely expressed in a circular issued by the Minister of Foreign Relations of Colombia, November 27, 1914:

¹ It was forgotten from 1915 to 1917 and is now forgotten, that the date when President Wilson issued his appeal, August 18, 1914, was prior to the issue of the English “White Book” in this country, prior to the arrival of news of the alleged Belgian atrocities and the Bryce Report on the same, prior to any Zeppelin raid, prior to news of the “scrap of paper” conversation of the British Ambassador with Bethmann-Hollweg in Berlin, and prior to the devastation of Rheims Cathedral and Louvain Library. [Footnote by Mr. Warren.]

Not because the public authorities are the only personalities upon whom is incumbent the duty of showing neither favor nor hostility to belligerents, nor because impartiality can co-exist with sympathies or antipathies more or less definite, nor finally because the liberty of the press authorizes in practice all kinds of publications, ought one to admit as proper the possibility for the press to take no account of truth, courtesy and good will. Absolute liberty of the press does not nullify the duty here in question. . . . Sympathies and antipathies can be expressed in the reasonable form of truth, in the respectful form of courtesy, and in the Christian form of good will. It is no longer true to say that, once the Government has officially observed impartiality, associations, individuals, and the press can express themselves as they please; for we have seen that such an attitude may wound aliens domiciled in the country, occasion the hostility, with all its injurious consequences, of powerful governments, tarnish the good reputation of the country itself.

If the citizens and press of the United States shall not choose to refrain from attacks on the one belligerent or the other, if they shall not deliberately curb their prejudices and their sympathies, then they must not be surprised if conditions are produced in this country which will make avoidance of implication in the war very difficult.

Such are the ways in which we can try to keep out of war. But we must be willing to pay the price, and above all we must not fool ourselves into the belief that the road will be an easy one. Neutrality alone will not keep us out. There are obligations which we must assume and there are rights which we must waive if we wish to attain our object. That lesson, our experience in the Great War should teach us.

The question then arises, however, whether, under such circumstances, the price of neutrality may not be too high; and whether neutrality, with such added burdens and concessions or surrender of rights, will not be too disagreeable a status for this country to assume. And thus the further question is at once presented: Should not the people of this country be led to give more serious, intense, and continuous consideration to joining with other nations in all practicable movements to prevent the occurrence of any war which would involve us in so difficult, so burdensome, and so disagreeable (even if not impossible) neutrality?

§ 190. RECENT NEUTRAL POLICIES OF THE UNITED STATES

NOTE BY THE EDITOR

Mr. Warren's article was an influential part of a general public discussion centering around the question: Can Congress, by the enactment of permanent neutrality legislation in time of peace, keep the United States

out of future wars? A feeling that some effort of this sort should be made led to the enactment of four so-called "neutrality acts": Joint Resolutions of August 31, 1935 (49 Stat. 1081), February 29, 1936 (49 Stat. 1152), May 1, 1937 (50 Stat. 121), and November 4, 1939 (Public Resolution No. 54—76th Cong., Chap. 2—2d Sess.). The outbreak of the Spanish Civil War in July, 1936, led also to the enactment of similar legislation applying only to Spain, January, 1937 (50 Stat. 3). This legislation was tested in four critical international situations: the Italo-Ethiopian conflict of 1935, the Spanish Civil War of 1936-1939, the phase of the Sino-Japanese conflict beginning in 1937, and the outbreak of war in Europe, September, 1939. Each test served to illustrate the difficulty of laying down neutrality policy by Act of Congress in advance of specific situations; and in 1939 the failure of the 1937 Act to reflect public feeling as to proper "neutral policy," led to the enactment of new legislation less than eleven weeks after the beginning of the European War. A brief discussion of these policies and events follows.

It should be understood, of course, that the "neutrality acts" were additions to domestic legislation dealing with neutrality already in effect. Salient features of this legislation have been suggested above in §§ 175, 189.¹ This legislation, in the main, was not changed by the provisions of the various "neutrality acts." There was also on the statute books a Joint Resolution of Congress of March 14, 1912,² authorizing the President to apply an embargo on shipments of "arms or munitions of war" to "any American country," if he found that conditions of domestic violence existed which were promoted by the use of arms or munitions secured from the United States; and this provision had been extended in effect to China, in 1922.³

1. *The "Neutrality Act" of August 31, 1935*,⁴ enacted in anticipation of the Italo-Ethiopian conflict, was temporary only, though its main provisions were incorporated in the Joint Resolution of May 1, 1937. It provided that:

(1) "Upon the outbreak or during the progress of war between, or among, two foreign States, the President shall proclaim such fact, and it shall thereafter be unlawful to export arms, ammunition, or implements of war from any place in the United States, or to any neutral port for trans-

¹ See also E. Dumbauld, "Neutrality Laws of the United States," 31 *A.J.I.L.* (1937), 254.

² 37 Stat. 630.

³ Joint Resolution approved January 31, 1932; 42 Stat. 361.

⁴ Joint Resolution of August 31, 1935, 49 Stat. 1081. "Neutrality Act" is a popular name only; the words "neutrality" or "neutral" do not appear in the title, which is as follows: "JOINT RESOLUTION, Providing for the prohibition of the export of arms, ammunition, and implements of war to belligerent countries; the prohibition of the transportation of arms, ammunition, and implements of war by vessels of the United States for the use of belligerent states; for the registration and licensing of persons engaged in the business of manufacturing, exporting, or importing arms, ammunition, or implements of war; and restricting travel by American citizens on belligerent ships during war."

shipment to, or for the use of, a belligerent country." The President was authorized to enumerate the exports prohibited by the Act, and to revoke his proclamation. These provisions were to expire February 29, 1936. (Sec. 1.)⁵

(2) A National Munitions Control Board was to be established under the chairmanship of the Secretary of State. Manufacturers, exporters, and importers of "arms, ammunition, and implements of war" were required to register with the Secretary of State. Though the Secretary was required to issue such licenses unless such issuance was contrary to the act, other law or treaty, exports or imports of this character were prohibited unless a license therefor was secured.⁶

(3) "During any war in which the United States is neutral," and in which the President finds and proclaims that the prohibition of certain acts "will serve to maintain peace between the United States and foreign nations, or to promote the commercial interests of the United States and its citizens, or to promote the security of the United States," certain acts were prohibited for the duration of the President's proclamation. These acts were as follows: (a) The departure from a port of the United States (unless a sufficient bond was posted) of any vessel which the President had cause to believe "is about to carry out of a port of the United States . . . men or fuel, arms, ammunition, implements of war, or other supplies to any warship, tender or supply ship of a belligerent nation," when the evidence was insufficient to justify prohibition of departure under existing law. Vessels found to have previously committed such acts might be prohibited from leaving American ports for the duration of the war (Sec. 4).⁷ (b) Entry into, or departure from, American ports or territorial waters, of submarines "of a foreign nation," except under conditions and limitations prescribed by the President (Sec. 5).⁸ (c) Travel by citizens of the United States on the vessels of any belligerent nation. This was not a prohibition, but after a Presidential proclamation "no citizen of the United States shall travel on any vessel of any belligerent nation except at his own risk, unless in accordance with such rules and regulations as the President shall prescribe." Exceptions were provided for cases of citizens beginning their voyages prior to the proclamation, and (for ninety days after the proclamation) for cases of citizens returning to the United States (Sec. 6).⁹

⁵ Compare Sec. 1, Act approved May 1, 1937, below, page 978.

⁶ Compare Sec. 5, Act approved May 1, 1937, page 979, below, and Sec. 12, Act approved November 4, 1939, § 191 below.

⁷ Compare Sec. 7, Act approved May 1, 1937, page 979, below, and Sec. 10, Act approved November 4, 1939, § 191 below.

⁸ Compare Sec. 8, Act approved May 1, 1937, page 979 below, and Sec. 11, Act approved November 4, 1939, § 191 below.

⁹ Compare Sec. 9, Act approved May 1, 1937, page 979 below, and Sec. 5, Act approved November 4, 1939, § 191 below.

2. *American "Neutrality" in the Italo-Ethiopian Conflict, 1935.* In the Italo-Ethiopian conflict beginning in 1935, neither Italy nor Ethiopia admitted the existence of a legal state of war, though substantial military operations by Italy in Ethiopia led to Italian annexation of Ethiopia, recognized by most States by 1939. Although there is some question whether the Council or Assembly of the League of Nations ever actually *decided* that Italy had "resorted to war" in violation of Article 12 of the Covenant, the Committee of Co-ordination authorized by the League Assembly recommended to States the application of various "sanctions." (See § 136, above.) Even before this, on October 5, President Roosevelt, acting under Section 1 of the 1935 Joint Resolution, proclaimed that "a state of war unhappily exists between Ethiopia and the Kingdom of Italy," and listed the articles to be considered "arms, ammunition, and implements of war,"¹⁰ the export of which was to be prohibited to both belligerents. A second proclamation of the same date, under Sec. 6, gave notice that citizens of the United States traveled on vessels of the belligerents at their own risk.¹¹ The President went even further, and, without statutory authorization, declared on the same day that he desired it to be understood "that any of our people who

¹⁰ The list:

Category I

- (1) Rifles and carbines using ammunition in excess of cal. 26.5, and their barrels;
- (2) Machine guns, automatic rifles, and machine pistols of all calibers, and their barrels;
- (3) Guns, howitzers, and mortars of all calibers, their mountings and barrels;
- (4) Ammunition for the arms enumerated under (1) and (2) above, i. e., high-power steel-jacketed ammunition in excess of cal. 26.5; filled and unfilled projectiles and propellants with a web thickness of .015 inch or greater for the projectiles of the arms enumerated under (3) above;
- (5) Grenades, bombs, torpedoes, and mines, filled or unfilled, and apparatus for their use or discharge;
- (6) Tanks, military armored vehicles, and armored trains.

Category II

Vessels of war of all kinds, including aircraft carriers and submarines.

Category III

(1) Aircraft, assembled or dismantled, both heavier and lighter than air, which are designed, adapted, and intended for aerial combat by the use of machine guns or of artillery or for the carrying and dropping of bombs, or which are equipped with, or which by reason of design or construction are prepared for, any of the appliances referred to in paragraph (2), below.

(2) Aerial gun mounts and frames, bomb racks, torpedo carriers, and bomb or torpedo release mechanisms.

Category IV

Revolvers and automatic pistols of a weight in excess of 1 pound 6 ounces (630 grams), using ammunition in excess of cal. 26.5, and ammunition therefor.

Category V

(1) Aircraft assembled or dismantled, both heavier and lighter than air, other than those included in Category III;

(2) Propellers or air screws, fuselages, hulls, tail units, and under carriage units;

(3) Aircraft engines.

Category VI

(1) Livens projectors and flame throwers;

(2) Mustard gas, lewisite, ethyldichlorarsine, and methyldichlorarsine.

¹¹ Texts of these Proclamations are in Department of State *Press Releases*, October 5, 1935, pages 251, 255.

voluntarily engage in transactions of any character with either of the belligerents do so at their own risk." This statement was subsequently emphasized, and its reason appeared in the fact that exports of oil, machinery, vehicles and chemicals to Italy (not prohibited by the Joint Resolution or the Proclamation of October 5) were increasing. On November 15 Secretary Hull referred with disapproval to the shipment of what he called "essential war materials," such as oil, copper, trucks, tractors, scrap iron, and scrap steel. "This class of trade," he declared, "although not actually 'arms, ammunition, or implements of war,' is directly contrary to the policy of this Government, as announced in official statements of the President and the Secretary of State, as it is also contrary to the general spirit of the recent Neutrality Act."¹² And on November 23, the Department of Commerce sent letters to American firms owning and operating ships mortgaged to the Government, stating that "the carrying of essential war materials such as those mentioned in the statement of the Secretary of State, November 15, is distinctly contrary to the policy of the Government."¹³

This experience warrants the following conclusions: (1) It was possible for the United States to have a "neutral policy" under the terms of the 1935 Act without assuming the rights and obligations of "traditional neutrality." Although the President declared that a state of war existed between Italy and Ethiopia, no proclamation of neutrality was issued, and there was no clear and explicit indication of what the policy of the United States would have been had either belligerent attempted to interfere with ordinary American commerce. Did the President's "trade at your own risk" policy and the lack of a proclamation of neutrality mean that no rights of "traditional neutrality" would be asserted by the United States? If so, such abandonment of traditional rights had not been authorized by statute, in the case of trade in commodities other than the embargoed "arms, ammunition, and implements of war." (2) By the same token, it was clear that the Act of 1935, although passed in definite expectation of Italo-Ethiopian hostilities, had not adequately dealt with the problem, and that if Congress desired to lay down policy in advance, it would have to be more explicit. (3) It was possible for the United States, acting under the Act of 1935, to co-operate with the League of Nations in the application of "sanctions." Both the prohibition of the export of arms, munitions, and instruments of war under the Act, and the President's effort to stop shipments of oil, trucks, and the like, extralegally,¹⁴ supported the "sanctions" which

¹² *Press Releases*, November 16, 1935, p. 382.

¹³ A. W. Dulles and H. F. Armstrong, *Can We Be Neutral?* (1936), p. 71.

¹⁴ It was generally understood in Congress, when the August, 1935, Joint Resolution was enacted, that "arms, ammunition, and implements of war" did not cover raw materials.

League States were applying against Italy. Though the principle of impartiality in the Act of 1935 required the United States to embargo shipments to Ethiopia also, League Members were at liberty to engage in this trade. Nevertheless the "Neutrality Act" of the United States became a valued support to Members of the League of Nations who applied sanctions to Italy. At the same time, the shipments of oil and the like from the United States, despite the efforts of the President to co-operate with the "petroleum sanction" (see § 136, above) showed the incomplete nature of such co-operation as was possible under the Act.

At all events, the conviction grew that supplementary legislation was necessary. While the Italo-Ethiopian conflict still engaged public attention, and growing tension in Europe and Asia heightened the controversy over permanent neutrality policy, the embargo provisions of the 1935 Act expired on February 29, 1936. To meet the immediate need, Congress hastily enacted a new law.

3. *The Revised "Neutrality Act" approved February 29, 1936*, was a temporary extension of the provisions of the Joint Resolution of 1935 with minor changes, to May 1, 1937. It was not intended to establish a permanent or complete "neutral policy." The changes were as follows:

(1) The provision for an impartial embargo on the export of "arms, ammunition, and implements of war" was made to depend upon a Presidential finding that "there exists a state of war between" the belligerents.

(2) The President was required (instead of being permitted, as in the 1935 Act) to extend this embargo to other belligerents, if and when they became involved in the war.

(3) After a Presidential proclamation of the embargo, the Joint Resolution made it unlawful for any person within the United States "to purchase, sell or exchange bonds, securities or other obligations of the government of any belligerent country, or of any political subdivision thereof, or of any person acting for or on behalf of such government, issued after the date of such proclamation, or to make any loan or extend any credit to such government or person"; but the President might except "ordinary commercial credits and short time obligations in aid of legal transactions and of a character customarily used in normal peace time commercial transactions." ¹⁵

¹⁵ Sale of Italian obligations in the United States was already unlawful under the terms of the "Johnson Act," approved April 13, 1934, 48 Stat. 574. This act makes it unlawful to sell in the United States obligations of any foreign government or subdivision thereof, while such government is in default in payment of obligations to the Government of the United States. Italy was in default on payment of World War debts owed to the United States Government. The Johnson Act is still in force (1939) and prevents the flotation of loans in the United States by Great Britain and France, for example.

See Sec. 3, Act approved May 1, 1937, below, p. 978; and Sec. 7, Act approved November 4, 1939, § 191 below.

(4) The Joint Resolution was declared not to apply "to an American republic or republics engaged in war against a non-American State or States, provided the American republic is not co-operating with a non-American State or States in such war."¹⁶ Thus a new version of the "Monroe Doctrine" inspired Congress to sanction shipments of arms, ammunition, and implements of war to American republics engaged in war with non-American States, in spite of the general "neutral policy" of embargoing such shipments; but if an American republic co-operated with non-American States in a war, presumably the embargo was to be applied to all the States involved.

4. *The Spanish Civil War, 1936-1939*,^{16a} began as an insurrection in July, 1936, which rapidly developed into civil war, and presented a new problem to a Congress bent on keeping the United States from being involved in any foreign conflict. The legislation of 1935 and 1936 did not apply to civil wars; but in a Joint Resolution, approved January 8, 1937, and solely applicable to Spain, Congress responded to the problem by the enactment of the leading idea of the 1935 and 1936 laws—embargo on arms and munitions of war to both sides.¹⁷ Under the Resolution, exports of "arms, ammunition, and implements of war" from the United States to Spain were prohibited.

It should be understood that this Resolution embodied a "neutral policy" only in that it embargoed shipments to both sides alike. It was not "traditional neutrality," which would only arise if the United States recognized the belligerency of the Spanish Insurgents; a course avoided not only by the United States, but by the other interested European Powers. Like the laws of 1935 and 1936, the Joint Resolution of January 8, 1937, sought to avoid trouble by a legislative assertion that no traditional "neutral right" to protect the commerce in arms and munitions would be claimed, because such commerce was made illegal. Nor was the policy of the Act like that previously pursued by the United States in the presence of foreign civil wars. In general, that policy had been: (a) "When the civil war was in Europe, to do nothing in the way of restricting the commerce in arms"; (b) "When the civil war was in Latin America, to prevent arms from reaching the rebels, but to help the recognized government to obtain them."¹⁸

¹⁶ Sec. 2, adding a Section 1b to the Act of 1935. Compare Sec. 4, Act of May 1, 1937, p. 979 below, and Sec. 9, Act approved November 4, 1939, § 191 below.

^{16a} On this whole subject see N. J. Padelford, *International Law and Diplomacy in the Spanish Civil Strife* (Macmillan, 1939), especially Chapters I, VI, Appendix XIV.

¹⁷ 50 Stat. 3.

¹⁸ Letter of C. C. Burlingham and P. C. Jessup, to the Editor of the *New York Times*, January 31, 1939. The policy in Latin America has often utilized the provisions of a Joint Resolution approved March 14, 1912. (See page 971 above.) "Whenever he [the President] shall find that in any American country conditions of domestic violence exist which are pro-

Neither of these policies, of course, was "traditional neutrality"; the former was not, because belligerency was not necessarily recognized; the latter was not, because it was avowedly partial to the recognized government. The former was "neutral" in the sense that the contending parties had equal right of access to American arms shipments; but the latter was not, even in that sense. The Act of January 8, 1937, thus deprived the Spanish Government of a commerce it had some right, from the precedents, to expect.

The policy embodied in the law of January 8, 1937, is really understandable only when considered as an act of international co-operation. The European States interested in the Spanish Civil War hoped, through the functioning of an international Spanish Nonintervention Committee, to prevent aid from all of them reaching the contending parties in Spain, and thus to isolate the Civil War. The law of January 8, 1937, though it represented independent "keep-out-of-war" feeling in the United States, lent the aid of the United States to the nonintervention policy of the European states; aid without which the success of the nonintervention policy was problematical. With the failure of the nonintervention policy, the increasingly overt participation of European States, especially by Germany and Italy, on behalf of the Insurgents, and the imminent military success of the Insurgent cause, sentiment grew in the United States during 1938 for the removal of the embargo on arms and munitions to the Spanish Government alone. Had this movement succeeded, it would have meant the application by the United States to Spain of the policy usually followed towards revolutions in Latin America, in a recoil from an important experiment in international co-operation. It would have involved traversing the road from collective nonintervention to partiality to the Spanish Government, but it would have had little to do with "neutrality." As it turned out, the victory of the Insurgents in 1939 and their recognition by Great Britain and France as the *de jure* Government of Spain resulted, on April 1, 1939, in a presi-

moted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export except under such limitations and exceptions as the President shall prescribe, any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress." (37 Stat. 630.) The President has customarily used this power to favor the existing governments. A list of cases is given in M. O. Hudson, "International Regulation of the Trade in and Manufacture of Arms and Ammunition," Report to the Committee Investigating the Munitions Industry, Senate Committee Print No. 1 (1935), 73d Cong., 2nd Sess., pp. 54 ff.; quoted in Briggs, *Law of Nations*, pp. 863-864. Regulations of the Secretary of State require approval of the diplomatic representatives of Cuba, Honduras, and Nicaragua, before issuance of permits to export to those States.

In the Havana Convention on Rights and Duties of States in the Event of Civil Strife, 1928 (see § 188), the United States agreed "to forbid the traffic in arms and war material except when intended for the government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied."

dential proclamation lifting the embargo, and in the establishment of diplomatic relations between the United States and the Franco Government.¹⁹

5. The "Neutrality Act" approved May 1, 1937 (50 Stat. 121) was intended, in the light of some of these experiences, to lay down a permanent "neutrality policy" for the United States. It re-enacted and made permanent, though with modifications in some particulars, the basic provisions of the law of August 31, 1935, as amended February 29, 1936. Certain features, however, should be noted: (1) the principle of impartiality was retained throughout: no embargo might be laid on one party to hostilities which was not laid on the other, apparently even in the case of a civil war; (2) the provisions of the Act were extended to cases of civil strife; (3) the application of many of the crucial provisions was dependent on the action of the President, which might be withheld; (4) the Act was inapplicable in cases where an American republic is engaged alone in war with a non-American State; and (5) the provision permitting embargoes on articles or materials "other than arms, ammunition, or implements of war," expired May 1, 1939. The Act is thus summarized by Mr. W. T. Stone:²⁰

I. *Mandatory Provisions.* "Whenever the President shall find that there exists a state of war between, or among, two or more foreign states, the President shall proclaim such fact, and it shall thereafter be unlawful":

1. To export "arms, ammunition or implements of war" to any belligerent states named in such proclamation, or to any neutral state for transshipment to such belligerent. (Sec. 1)

2. To "purchase, sell or exchange bonds, securities, or other obligations of the government of any belligerent state," or any political subdivision, or person or faction acting on behalf of such state: provided that the President may exempt "ordinary commercial credits and short-time obligations in aid of legal transactions and of a character customarily used in normal peacetime commercial transactions." (Sec. 3a) Above provisions do not apply to renewal or adjustment of debts existing on date of President's proclamation. Nothing in this section prohibits solicitation of funds "for medical aid" or "for food and clothing to relieve human suffering" by any person or organization not acting on behalf of a foreign government.

3. "To carry any arms, ammunition, or implements of war" on any American vessel to any belligerent state, or to any neutral country for transshipment to a belligerent. (Sec. 6)²¹

¹⁹ Department of State, *Press Releases*, April 1, 1939, pp. 245-247.

²⁰ "Will Neutrality Keep U. S. Out of War?" *Foreign Policy Reports*, October 1, 1939, p. 168.

²¹ In its original form, the Act contained a "cash-and-carry" clause giving the President authority, in his discretion, to prohibit American vessels from carrying "certain articles or materials" in addition to arms and ammunition, and requiring American citizens to transfer "all rights, title and interest" in any articles to a foreign government or agency before shipment to a belligerent nation. This clause (Sec. 2) expired on May 1, 1939 and was not renewed or extended by Congress during the regular session. [Note by Mr. Stone.]

4. For any citizen of the United States to travel on any belligerent vessel, except under such rules and regulations as the President may prescribe. (Sec. 9)

5. For any American vessel engaged in trade with belligerents "to be armed, or to carry any armament, arms, ammunition, or implements of war" except such small arms as the President may designate. (Sec. 10)

II. *Discretionary Provisions.* In his discretion the President may invoke the following measures:

1. To apply the arms embargo in cases of civil strife. (Sec. 1)

2. To prohibit the use of American ports as a base of supply for belligerent states. (Sec. 7)

3. To forbid submarines and armed merchant vessels of foreign states from entering American ports or territorial waters. (Sec. 8)

III. *Miscellaneous Provisions.* In addition to the foregoing provisions, the Act of 1937 does not apply to American republics engaged in war with a non-American state, "provided the American republic is not cooperating with a non-American state or states in such war." (Sec. 4)

The Act also makes provisions for a National Munitions Control Board with authority to license the manufacture and export of arms, ammunition and implements of war. (Sec. 5) Finally, the Act contains specific penalties for violation.

6. *The Sino-Japanese conflict, 1937.* As if to lend point to contentions that "neutral policy," being a part of general foreign policy, could not be legislated in mandatory terms in advance,²² came a new outbreak of hostilities beginning July 7, 1937, between China and Japan. The hostilities occurred on a wide scale, made use of the most modern methods, and resulted in the occupation of large parts of China by Japanese forces; yet because neither State desired it, there was no declaration of war by either side, and hence no legal "state of war." In this situation, the American Government took measures to protect the lives and property of its nationals in China, secured prompt apology and reparation from Japan for the sinking of the American naval vessel "Panay" by Japanese planes, declared that Japan had violated the Nine-Power Treaty and the "Kellogg-Briand" Pact, and insisted in more or less general terms upon the observance of the rules of international law. The United States did not, however, invoke the terms of the brand-new

²² The phase of the Sino-Japanese conflict beginning in 1931 and culminating in the establishment of "Manchukuo" as a new State is not treated here, since questions of American neutrality were not raised. In fact, the conduct of American foreign relations on this occasion represents an effort by the United States to lead League of Nations Members in a collective policy designed to halt Japan. While no sanctions were applied against Japan, the collective "nonrecognition" of the changed situation in Manchuria (see the materials in §26) represents the high-water mark of American achievement in collective security, though it brought about no change in Manchuria. It does not appear that at any time during the controversy the United States claimed the rights of a neutral in any sense. There was, of course, no legal "state of war" admitted either by China or Japan. On the whole subject, see A. W. Griswold, *The Far Eastern Policy of the United States* (1938), Chap. X.

1937 "Neutrality Act" or claim for itself the status of traditional neutrality. Instead, as far as commerce between the United States and China and Japan was concerned, the real policy adopted was that of "Business as usual." Although the President (shortly after the Japanese announcement of a blockade of ports of the Chinese coast, applying to Chinese vessels only) stated that merchant vessels owned by the United States Government would not be permitted to transport to China or Japan arms, ammunition, and implements of war, and that other merchant vessels flying the American flag carried such commodities at their own risk,²³ he declared at the same time that "the question of applying the Neutrality Act remains in *statu quo*, the Government policy remaining on a 24-hour basis."²⁴ It has not (November, 1939) been applied; no embargo has been laid on the export of war materials or other commodities, nor have any of the other provisions of the Act of 1937 been invoked.

Indeed, effective methods were found by which the Administration pursued a policy of partiality towards China. On December 15, 1938, it was announced that the Export-Import Bank (a United States government institution) had authorized a loan of \$25,000,000 to a New York company, to be used to finance the export of American "agricultural and manufactured products" to China. The loan was to be guaranteed by the Bank of China, and it was thought that the proceeds would be used in part to finance Chinese purchases of gasoline and motor trucks.²⁵ In terms of "traditional neutrality," was this a thinly disguised government loan to one of the belligerents? If a proclamation had been issued under the "Neutrality Act" of 1937, would this loan have conformed to the letter and the spirit of Section 3, which prohibits such loans by private individuals to both belligerents?

Again, the Secretary of State, after making repeated statements condemning the bombing of civilian populations, on July 1, 1938, sent to all manufacturers and exporters of aircraft or aircraft parts registered under the "Neutrality Act," a circular letter, stating that "the Department would with great regret issue any licenses authorizing exportation . . . of . . . aircraft [including parts or accessories], aerial bombs or torpedoes to countries the armed forces of which are making use of airplanes for attack upon civilian populations."²⁶ Only one firm did not conform to this suggestion,

²³ Undertaken without authorization of statute, this involved abandonment of traditional rights. If Japan and China were regarded as being at peace, this declaration withdrew legitimate peacetime protection; if they were regarded as being at war, the declaration abandoned all right of the United States to claim for American vessels the observance by Japan and China of the traditional rules of contraband and blockade.

²⁴ Statement of Sept. 14, 1937; *Press Releases*, Department of State, Sept. 18, 1937, p. 227.

²⁵ *The New York Times*, Dec. 16, 1938.

²⁶ Department of State, *Press Releases*, Jan. 14, 1939; Release of Jan. 12; *Third Annual Report*, Munitions Control Board.

and possibly as a result of its being named in the Secretary's statement of January 12, no exports of aircraft or their accessories appear to have been made to Japan after February, 1939, although large quantities of such exports were made to China.²⁷ If "traditional neutrality" had been the position of the United States, would this policy have been consistent with American neutral obligations? If the "Neutrality Act" of 1937 had been invoked, would this policy have conformed to its provisions?

Why was the "Neutrality Act" not applied? The legal reason was that no legal "state of war" existed between Japan and China justifying the President's finding of such a fact. It was pointed out, however, that this had not prevented a finding that a "state of war" existed in similar circumstances as between Italy and Ethiopia, or the application of the embargo principle to the undeclared civil war in Spain. The real explanation of failure to invoke the Act undoubtedly lay in the general realm of foreign policy, dominated by somewhat conflicting desires to protect American lives and property without bringing on armed conflict with Japan. Some of the reasons commonly advanced were: that finding a "state of war" to exist would force Japan or China to declare war, thus bringing about further strain on the League Covenant, and controversies over interferences with neutral commerce; that invoking the Act was a policy less adapted to keeping the United States from being involved in the hostilities than not invoking it; that noninvocation protected China's access to American war materials and thus aided the State favored by public opinion (a very "un-neutral" reason); and that after the Japanese blockade of August 25, the noninvocation policy would minimize difficulties of conflicts arising out of possible American insistence on traditional "neutral rights."

One great single fact emerges: that the "Neutrality Act" of 1937 proved inappropriate for use in the very first emergency arising after its enactment; an emergency, moreover, which might reasonably have been foreseen. The upshot was to strengthen doubts that permanent legislation could be drafted which would both (1) enable the United States to remain out of foreign wars and (2) permit the United States to participate strongly in efforts to *prevent* the outbreak of foreign wars of such a nature and extent as to engulf the United States. In the halls of Congress this difficulty took the form of a controversy between those who would lay down mandatory inflexible rules to bind the Executive and those who would give him more freedom in the conduct of neutral, as well as other, foreign policy.

7. *The European War beginning September 1, 1939*, put an end to the "permanent" neutrality policy intended by the Joint Resolution of May 1, 1937, in less than eleven weeks, as Congress enacted a new "Neutrality

²⁷ *Press Releases*, February 11, March 11, April 15, May 13, and *Bulletin*, November 25, 1939.

Act," approved November 4, 1939.²⁸ During this short period the Administration took various opportunities after the issuance of a traditional Neutrality Proclamation (see § 175, notes, pages 857-862) to point out that despite the neutrality legislation the United States had not abandoned any of its rights under international law;²⁹ but at the same time the provisions of the 1937 legislation were put into effect. A presidential proclamation of September 5 that a state of war existed³⁰ brought into operation all the mandatory provisions of the Joint Resolution, including the embargo on arms, ammunition and implements of war.³¹ In successive proclamations and regulations

²⁸ Reprinted as § 191 below.

²⁹ Statement of Secretary Hull, September 14; see above page 857, note 1; Statement of October 4: "The Government of the United States does not recognize the legality of unrestricted interference with American ships and commerce," *Department of State Bulletin*, October 7, 1939, p. 343; Statement of October 4: "While under international law American citizens have a perfect right to travel on belligerent vessels, and while under our statute they may travel on such vessels en route from a foreign country to the United States for an additional period of 60 days from October 5, I regard such travel as dangerous considering the character of the warfare that is now in progress. I, therefore, call upon all American citizens, in their own interest and in the interest of their Government, to refrain from exercising the right which they have in this respect." *Ibid.*, 345. In his speech to Congress on September 21, the President contended that repeal of the arms embargo would be a return to international law. *The New York Times*, September 22, 1939.

³⁰ "Between Germany and France; Poland; and the United Kingdom, India, Australia and New Zealand," *Department of State Bulletin*, September 9, 1939, pp. 208-209. "Between Germany . . . and Canada," (September 10), *Bulletin*, Sept. 16, p. 246.

³¹ The list follows:

Category I

- (1) Rifles and carbines using ammunition in excess of caliber .22, and barrels for those weapons;
- (2) Machine guns, automatic or autoloading rifles, and machine pistols using ammunition in excess of caliber .22, and barrels for those weapons;
- (3) Guns, howitzers, and mortars of all calibers, their mountings and barrels;
- (4) Ammunition in excess of caliber .22 for the arms enumerated under (1) and (2) above, and cartridge cases or bullets for such ammunition; filled and unfilled projectiles for the arms enumerated under (3) above;
- (5) Grenades, bombs, torpedoes, mines and depth charges, filled or unfilled, and apparatus for their use or discharge;
- (6) Tanks, military armored vehicles, and armored trains.

Category II

Vessels of war of all kinds, including aircraft carriers and submarines, and armor plate for such vessels.

Category III

- (1) Aircraft, unassembled, assembled, or dismantled, both heavier and lighter than air, which are designed, adapted, and intended for aerial combat by the use of machine guns or of artillery or for the carrying and dropping of bombs, or which are equipped with, or which by reason of design or construction are prepared for, any of the appliances referred to in paragraph (2) below;
- (2) Aerial gun mounts and frames, bomb racks, torpedo carriers, and bomb or torpedo release mechanisms.

Category IV

- (1) Revolvers and automatic pistols using ammunition in excess of caliber .22;
- (2) Ammunition in excess of caliber .22 for the arms enumerated under (1) above, and cartridge cases or bullets for such ammunition.

the President and the Secretary of State exercised discretionary powers conferred by the Act: forbidding the use of United States ports and territorial waters to belligerent submarines,³² though not to belligerent armed merchantmen;³³ prescribing rules under which American citizens might travel

Category V

- (1) Aircraft, unassembled, assembled or dismantled, both heavier and lighter than air, other than those included in Category III;
- (2) Propellers or air screws, fuselages, hulls, wings, tail units, and under-carriage units;
- (3) Aircraft engines, unassembled, assembled, or dismantled.

Category VI

- (1) Livens projectors and flame throwers;
- (2)
 - a. Mustard gas (dichlorethyl sulphide);
 - b. Lewisite (chlorvinylchlorarsine and dichlorovinylchlorarsine);
 - c. Methylchlorarsine;
 - d. Diphenylchlorarsine;
 - e. Diphenylcyanarsine;
 - f. Diphenylaminechlorarsine;
 - g. Phenylchlorarsine;
 - h. Ethylchlorarsine;
 - i. Phenylbromarsine;
 - j. Ethyldibromarsine;
 - k. Phosgene;
 - l. Monochloromethylchlorformate;
 - m. Trichloromethylchlorformate (diphosgene);
 - n. Dichlorodimethyl Ether;
 - o. Dibromodimethyl Ether;
 - p. Cyanogen Chloride;
 - q. Ethylbromacetate;
 - r. Ethyliodoacetate;
 - s. Brombenzylcyanide;
 - t. Bromacetone;
 - u. Brommethylethyl ketone.

Category VII

- (1) Propellant powders;
- (2) High explosives as follows:
 - a. Nitrocellulose having a nitrogen content of more than 12%;
 - b. Trinitrotoluene;
 - c. Trinitroxyline;
 - d. Tetryl (trinitrophenol methyl nitramine or tetranitro methylaniline);
 - e. Picric acid;
 - f. Ammonium picrate;
 - g. Trinitroanisole;
 - h. Trinitronaphthalene;
 - i. Tetranitronaphthalene;
 - j. Hexanitrodiphenylamine;
 - k. Pentaerythritetranitrate (Pentrite or Pentrite);
 - l. Trimethylenetrinitramine (Hexogen or T₄);
 - m. Potassium nitrate powders (black saltpeter powder);
 - n. Sodium nitrate powders (black soda powder);
 - o. Amatol (mixture of ammonium nitrate and trinitrotoluene);
 - p. Ammonal (mixture of ammonium nitrate, trinitrotoluene, and powdered aluminum, with or without other ingredients);
 - q. Schneiderite (mixture of ammonium nitrate and dinitronaphthalene, with or without other ingredients).

—*Department of State Bulletin*, September 9, 1939, pp. 209-210.

³² October 18, 1939. Submarines might enter under *force majeure*, but they must navigate and depart on the surface, flying their own colors. *Bulletin*, October 21, 1939, pp. 396-397.

³³ Though belligerent armed merchantmen might have been excluded or regulated under Sec. 8 of the law. Admission to neutral ports of such merchantmen encourages their use by

on belligerent vessels;³⁴ permitting transactions in "ordinary commercial credits and short-time obligations in aid of legal transactions" of a normal peacetime character;³⁵ and permitting solicitation of funds in the United States by nongovernmental agencies registered with the Secretary of State, "to be used for medical aid and assistance, or for food and clothing to relieve human suffering . . ." ³⁶

The chief public dissatisfaction with the legislation of 1937 as applied to the European War of 1939 lay in the arms embargo.³⁷ Even before the war broke out, the President had sought to have the embargo removed, because it might operate, in his judgment, in favor of an aggressor. When the war came, the general sentiment of the country came to be that such was the operation of the embargo, and a special session of Congress eliminated it in the Joint Resolution approved November 4, 1939.

The embargo on arms applied, of course, to shipments to all the belligerent powers: it was thus impartial—and truly neutral—though its impartiality and neutrality went beyond what was required by existing international law. In its *operation*, however, there was no doubt that it harmed Great Britain and France more than it did Germany. This was true only because of the geographic, economic, and political circumstances of the warring Powers. British sea power could shut off German commerce, so that Germany could not buy American arms and munitions even if the market were open to her; but Great Britain and France could buy arms and munitions in the American market if they were not prevented by the embargo.

The proposal to lift the arms embargo, successful in the Joint Resolution approved November 4, 1939, obtained wide popular support because of the belief that Germany was the aggressor, and that the United States should co-operate with those opposing the aggressor by supplying them with arms and munitions. In form, since lifting the embargo applied to all belligerents, the new Joint Resolution was impartial and neutral; in form also it was a "return" to international law, which permitted private sales of arms and munitions to belligerents. So far as it went, it was even "traditional neutrality," though other provisions of the law, like the "cash

belligerents; and this in turn is an open invitation to unrestricted submarine warfare. This fact was recognized by the United States in 1916 (see § 169 above), and by mandatory prohibitions of armament of *American* merchantmen trading with belligerents in the Joint Resolutions of 1937 and 1939 (Secs. 10 and 6 respectively).

³⁴ Travel of military, naval and diplomatic officers, families and staffs was permitted, but private citizens were required to secure permits from the Secretary of State for travel in war zone areas in Europe. *Bulletin*, September 9, 1929, pp. 219-220. This was not a presidential proclamation, but a Regulation issued by the Secretary of State on September 5.

³⁵ *Ibid.*, p. 221.

³⁶ *Ibid.*, pp. 222-225.

³⁷ The discretionary authority of the President to embargo articles or materials other than arms, ammunition, or implements of war (Sec. 2) had expired May 1, 1939.

and carry" clauses, were far from traditional neutrality. In its *effect*, in the actual situation into which it was projected, the Joint Resolution was partial and unneutral, and was intended as an act of international co-operation to help Great Britain and France defeat Germany.

None the less, it was generally hoped that other provisions of the 1939 legislation would prevent this type of international co-operation from pulling the United States into the war. These provisions were: (1) The "cash and carry" provisions, requiring that no articles or materials could be exported to a belligerent until all "right, title, or interest therein" should have passed to a foreign purchaser.³⁸ (2) The provision that the President might designate by proclamation "combat areas," to be closed to American citizens and vessels.³⁹ (3) The provision that citizens might not legally travel on vessels of belligerents, except under presidential rules and regulations.⁴⁰ (4) The prohibition of loans to the belligerents in the United States.⁴¹ (5) Provisions against the use of American ports in aid of the belligerents.⁴² (6) Discretionary presidential powers to restrict the use of United States ports or territorial waters by submarines or armed merchantmen.⁴³ (7) Licensing of the manufacture, sale, imports, and exports of arms, ammunition, and implements of war, through the National Munitions Control Board.⁴⁴ (8) Prohibition of the use of the American flag or its markings by foreign vessels.⁴⁵

It remained to be seen whether these measures of protection, expressing "keep-out-of-war" sentiment, would be strong enough to offset in the long run the strong pull of the anti-aggression feeling which had so quickly succeeded in lifting the embargo. The American people in 1939 were still cherishing two ultimately antagonistic ideals: a deep desire to keep clear of involvement in foreign conflicts, and an equally deep, though more fluctuating, desire to help punish international aggressors. The Joint Resolution of November 4, 1939, reprinted below, embodies both of these ideals.

³⁸ Sec. 2(c). A similar provision (Sec. 2[a]) of the Joint Resolution of 1937 had expired May 1, 1939.

³⁹ Sec. 3. See below, page 990.

⁴⁰ Sec. 5. A similar provision appeared in Sec. 9 of the 1937 Joint Resolution. See above, page 979.

⁴¹ Sec. 7. A similar provision appeared in Sec. 3 of the 1937 Joint Resolution. See above, page 978.

⁴² Sec. 10. Similar provisions appeared in Sec. 7 of the 1937 Joint Resolution.

⁴³ Sec. 11. See above page 979; below, page 994.

⁴⁴ Sec. 12. Similar provisions appeared in the legislation of 1935 and 1937 (Sec. 5).

⁴⁵ Sec. 14.

§ 191. RECENT NEUTRAL POLICIES OF THE UNITED STATES
(Continued): "NEUTRALITY ACT" OF 1939

PUBLIC RESOLUTION—NO. 54—76TH CONGRESS

CHAPTER 2—2D SESSION

H. J. Res. 306

JOINT RESOLUTION

To preserve the neutrality and the peace of the United States and to secure the safety of its citizens and their interests.

Whereas the United States, desiring to preserve its neutrality in wars between foreign states and desiring also to avoid involvement therein, voluntarily imposes upon its nationals by domestic legislation the restrictions set out in this joint resolution; and

Whereas by so doing the United States waives none of its own rights or privileges, or those of any of its nationals, under international law, and expressly reserves all the rights and privileges to which it and its nationals are entitled under the law of nations; and

Whereas the United States hereby expressly reserves the right to repeal, change or modify this joint resolution or any other domestic legislation in the interests of the peace, security or welfare of the United States and its people: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

PROCLAMATION OF A STATE OF WAR BETWEEN FOREIGN STATES

SECTION 1. (a) That whenever the President, or the Congress by concurrent resolution, shall find that there exists a state of war between foreign states, and that it is necessary to promote the security or preserve the peace of the United States or to protect the lives of citizens of the United States, the President shall issue a proclamation naming the states involved; and he shall, from time to time, by proclamation, name other states as and when they may become involved in the war.¹

(b) Whenever the state of war which shall have caused the President to issue any proclamation under the authority of this section shall have ceased to exist with respect to any state named in such proclamation, he shall revoke such proclamation with respect to such state.

¹ A Presidential Proclamation of November 4, 1939, proclaimed "that a state of war unhappily exists between Germany and France; Poland; and the United Kingdom, India, Australia, Canada, New Zealand, and the Union of South Africa"; and revoked proclamations under the 1937 Joint Resolution imposing arms embargoes.—Department of State *Bulletin*, November 4, 1939, pp. 453-454.

COMMERCE WITH STATES ENGAGED IN ARMED CONFLICT

SEC. 2. (a) Whenever the President shall have issued a proclamation under the authority of section 1 (a) it shall thereafter be unlawful for any American vessel to carry any passengers or any articles or materials to any state named in such proclamation.

(b) Whoever shall violate any of the provisions of subsection (a) of this section or of any regulations issued thereunder shall, upon conviction thereof, be fined not more than \$50,000 or imprisoned for not more than five years, or both. Should the violation be by a corporation, organization, or association, each officer or director thereof participating in the violation shall be liable to the penalty herein prescribed.

(c) Whenever the President shall have issued a proclamation under the authority of section 1 (a) it shall thereafter be unlawful to export or transport, or attempt to export or transport, or cause to be exported or transported, from the United States to any state named in such proclamation, any articles or materials (except copyrighted articles or materials) until all right, title, and interest therein shall have been transferred to some foreign government, agency, institution, association, partnership, corporation, or national. Issuance of a bill of lading under which title to the articles or materials to be exported or transported passes to a foreign purchaser unconditionally upon the delivery of such articles or materials to a carrier, shall constitute a transfer of all right, title, and interest therein within the meaning of this subsection. The shipper of such articles or materials shall be required to file with the collector of the port from or through which they are to be exported a declaration under oath that he has complied with the requirements of this subsection with respect to transfer of right, title, and interest in such articles or materials, and that he will comply with such rules and regulations as shall be promulgated from time to time. Any such declaration so filed shall be a conclusive estoppel against any claim of any citizen of the United States of right, title, or interest in such articles or materials, if such citizen had knowledge of the filing of such declaration; and the exportation or transportation of any articles or materials without filing the declaration required by this subsection shall be a conclusive estoppel against any claim of any citizen of the United States of right, title, or interest in such articles or materials, if such citizen had knowledge of such violation. No loss incurred by any such citizen (1) in connection with the sale or transfer of right, title, and interest in any such articles or materials or (2) in connection with the exportation or transportation of any such copyrighted articles or materials, shall be made the basis of any claim put forward by the Government of the United States.

(d) Insurance written by underwriters on articles or materials included

in shipments which are subject to restrictions under the provisions of this joint resolution, and on vessels carrying such shipments shall not be deemed an American interest therein, and no insurance policy issued on such articles or materials, or vessels, and no loss incurred thereunder or by the owners of such vessels, shall be made the basis of any claim put forward by the Government of the United States.

(e) Whenever any proclamation issued under the authority of section 1 (a) shall have been revoked with respect to any state the provisions of this section shall thereupon cease to apply with respect to such state, except as to offenses committed prior to such revocation.

(f) The provisions of subsection (a) of this section shall not apply to transportation by American vessels on or over lakes, rivers, and inland waters bordering on the United States, or to transportation by aircraft on or over lands bordering on the United States; and the provisions of subsection (c) of this section shall not apply (1) to such transportation of any articles or materials other than articles listed in a proclamation referred to in or issued under the authority of section 12 (i), or (2) to any other transportation on or over lands bordering on the United States of any articles or materials other than articles listed in a proclamation referred to in or issued under the authority of section 12 (i); and the provisions of subsections (a) and (c) of this section shall not apply to the transportation referred to in this subsection and subsections (g) and (h) of any articles or materials listed in a proclamation referred to in or issued under the authority of section 12 (i) if the articles or materials so listed are to be used exclusively by American vessels, aircraft, or other vehicles in connection with their operation and maintenance.

(g) The provisions of subsections (a) and (c) of this section shall not apply to transportation by American vessels (other than aircraft) of mail, passengers, or any articles or materials (except articles or materials listed in a proclamation referred to in or issued under the authority of section 12 (i)) (1) to any port in the Western Hemisphere south of thirty-five degrees north latitude, (2) to any port in the Western Hemisphere north of thirty-five degrees north latitude and west of sixty-six degrees west longitude, (3) to any port on the Pacific or Indian Oceans, including the China Sea, the Tasman Sea, the Bay of Bengal, and the Arabian Sea, and any other dependent waters of either of such oceans, seas, or bays, or (4) to any port on the Atlantic Ocean or its dependent waters south of thirty degrees north latitude. The exceptions contained in this subsection shall not apply to any such port which is included within a combat area as defined in section 3 which applies to such vessels.

(h) The provisions of subsections (a) and (c) of this section shall not

apply to transportation by aircraft of mail, passengers, or any articles or materials (except articles or materials listed in a proclamation referred to in or issued under the authority of section 12 (i)) (1) to any port in the Western Hemisphere, or (2) to any port on the Pacific or Indian Oceans, including the China Sea, the Tasman Sea, the Bay of Bengal, and the Arabian Sea, and any other dependent waters of either of such oceans, seas, or bays. The exceptions contained in this subsection shall not apply to any such port which is included within a combat area as defined in section 3 which applies to such aircraft.

(i) Every American vessel to which the provisions of subsections (g) and (h) apply, and every neutral vessel to which the provisions of subsection (l) apply, shall, before departing from a port or from the jurisdiction of the United States, file with the collector of customs of the port of departure, or if there is no such collector at such port then with the nearest collector of customs, a sworn statement (1) containing a complete list of all the articles and materials carried as cargo by such vessel, and the names and addresses of the consignees of all such articles and materials, and (2) stating the ports at which such articles and materials are to be unloaded and the ports of call of such vessel. All transportation referred to in subsections (f), (g), (h), and (l) of this section shall be subject to such restrictions, rules, and regulations as the President shall prescribe; but no loss incurred in connection with any transportation excepted under the provisions of subsections (g), (h), and (l) of this section shall be made the basis of any claim put forward by the Government of the United States.

(j) Whenever all proclamations issued under the authority of section 1 (a) shall have been revoked, the provisions of subsections (f), (g), (h), (i), and (l) of this section shall expire.

(k) The provisions of this section shall not apply to the current voyage of any American vessel which has cleared for a foreign port and has departed from a port or from the jurisdiction of the United States in advance of (1) the date of enactment of this joint resolution, or (2) any proclamation issued after such date under the authority of section 1 (a) of this joint resolution; but any such vessel shall proceed at its own risk after either of such dates, and no loss incurred in connection with any such vessel or its cargo after either of such dates shall be made the basis of any claim put forward by the Government of the United States.

(l) The provisions of subsection (c) of this section shall not apply to the transportation by a neutral vessel to any port referred to in subsection (g) of this section of any articles or materials (except articles or materials listed in a proclamation referred to in or issued under the authority of section 12 (i)) so long as such port is not included within a combat area as defined in section 3 which applies to American vessels.

COMBAT AREAS

SEC. 3. (a) Whenever the President shall have issued a proclamation under the authority of section 1 (a), and he shall thereafter find that the protection of citizens of the United States so requires, he shall, by proclamation, define combat areas, and thereafter it shall be unlawful, except under such rules and regulations as may be prescribed, for any citizen of the United States or any American vessel to proceed into or through any such combat area. The combat areas so defined may be made to apply to surface vessels or aircraft, or both.²

(b) In case of the violation of any of the provisions of this section by any American vessel, or any owner or officer thereof, such vessel, owner, or officer shall be fined not more than \$50,000 or imprisoned for not more than five years, or both. Should the owner of such vessel be a corporation, organization, or association, each officer or director participating in the violation shall be liable to the penalty hereinabove prescribed. In case of the violation of this section by any citizen traveling as a passenger, such pas-

² A Presidential Proclamation of November 4, 1939, declared that "the protection of citizens of the United States requires that there be defined a combat area through or into which it shall be unlawful, except under such rules and regulations as may be prescribed, for any citizen of the United States or any American vessel, whether a surface vessel or an aircraft, to proceed." The combat areas are described by latitude and longitude. In a press statement the same day the President said: "In plain English, the chief result is this: From now on, no American ships may go to belligerent ports, British, French, and German, in Europe or Africa as far south as the Canary Islands. This is laid down in the law, and there is no discretion in the matter."

"By proclaiming a combat area I have set out the area in which the actual operations of the war appear to make navigation of American ships dangerous. This combat area takes in the whole Bay of Biscay, except waters on the north coast of Spain so close to the Spanish coast as to make danger of attack unlikely. It also takes in all the waters around Great Britain, Ireland and the adjacent islands including the English Channel. It takes in the whole North Sea, running up the Norwegian coast to a point south of Bergen. It takes in all of the Baltic Sea and its dependent waters."

"In substance, therefore, American ships cannot now proceed to any ports in France, Great Britain, or Germany. This is by statute. By proclamation they cannot proceed to any ports in Ireland, nor to any port in Norway south of Bergen; nor to any ports in Sweden, Denmark, Netherlands, or Belgium, nor to Baltic ports. All neutral ports in the Mediterranean and Black Seas are open; likewise all ports, belligerent or neutral, in the Pacific and Indian Oceans and dependent waters, and all ports in Africa south of the latitude of the Canaries (30° N.)."

"I have discretion to permit, within the spirit of the law, American shipping to operate in the combat areas, where there is necessity. It is intended by regulation to provide that ships and citizens who are now in combat areas may get out of them; and for the minimum of necessary official, relief, and other similar travel which must go on in such areas. It is also intended to provide that vessels which cleared for combat areas before the act and proclamation became effective shall be allowed to complete their voyages."

"Combat areas may change with circumstances, and it may be found that areas now safe become dangerous, or that areas now troubled may later become safe. In this case the areas will be changed to fit the situation."

"Coastwise American shipping is not affected by the bill nor is shipping between American republics or Bermuda or any of the Caribbean islands. In the main, shipping between the United States and Canada is also not affected."—Department of State *Bulletin*, November 4, 1939, pp. 454-456.

senger may be fined not more than \$10,000 or imprisoned for not more than two years, or both.

(c) The President may from time to time modify or extend any proclamation issued under the authority of this section, and when the conditions which shall have caused him to issue any such proclamation shall have ceased to exist he shall revoke such proclamation and the provisions of this section shall thereupon cease to apply, except as to offenses committed prior to such revocation.

AMERICAN RED CROSS

SEC. 4. The provisions of section 2 (a) shall not prohibit the transportation by vessels under charter or other direction and control of the American Red Cross, proceeding under safe conduct granted by states named in any proclamation issued under the authority of section 1 (a), of officers and American Red Cross personnel, medical personnel, and medical supplies, food, and clothing, for the relief of human suffering.

TRAVEL ON VESSELS OF BELLIGERENT STATES

SEC. 5. (a) Whenever the President shall have issued a proclamation under the authority of section 1 (a) it shall thereafter be unlawful for any citizen of the United States to travel on any vessel of any state named in such proclamation, except in accordance with such rules and regulations as may be prescribed.

(b) Whenever any proclamation issued under the authority of section 1 (a) shall have been revoked with respect to any state the provisions of this section shall thereupon cease to apply with respect to such state, except as to offenses committed prior to such revocation.

ARMING OF AMERICAN MERCHANT VESSELS PROHIBITED

SEC. 6. Whenever the President shall have issued a proclamation under the authority of section 1 (a), it shall thereafter be unlawful, until such proclamation is revoked, for any American vessel, engaged in commerce with any foreign state to be armed, except with small arms and ammunition therefor, which the President may deem necessary and shall publicly designate for the preservation of discipline aboard any such vessel.

FINANCIAL TRANSACTIONS

SEC. 7. (a) Whenever the President shall have issued a proclamation under the authority of section 1 (a), it shall thereafter be unlawful for any person within the United States to purchase, sell, or exchange bonds, securities, or other obligations of the government of any state named in such

proclamation, or of any political subdivision of any such state, or of any person acting for or on behalf of the government of any such state, or political subdivision thereof, issued after the date of such proclamation, or to make any loan or extend any credit (other than necessary credits accruing in connection with the transmission of telegraph, cable, wireless and telephone services) to any such government, political subdivision, or person. The provisions of this subsection shall also apply to the sale by any person within the United States to any person in a state named in any such proclamation of any articles or materials listed in a proclamation referred to in or issued under the authority of section 12 (i).

(b) The provisions of this section shall not apply to a renewal or adjustment of such indebtedness as may exist on the date of such proclamation.

(c) Whoever shall knowingly violate any of the provisions of this section or of any regulations issued thereunder shall, upon conviction thereof, be fined not more than \$50,000 or imprisoned for not more than five years, or both. Should the violation be by a corporation, organization, or association, each officer or director thereof participating in the violation shall be liable to the penalty herein prescribed.

(d) Whenever any proclamation issued under the authority of section 1 (a) shall have been revoked with respect to any state the provisions of this section shall thereupon cease to apply with respect to such state, except as to offenses committed prior to such revocation.

SOLICITATION AND COLLECTION OF FUNDS AND CONTRIBUTIONS

SEC. 8. (a) Whenever the President shall have issued a proclamation under the authority of section 1 (a), it shall thereafter be unlawful for any person within the United States to solicit or receive any contribution for or on behalf of the government of any state named in such proclamation or for or on behalf of any agent or instrumentality of any such state.

(b) Nothing in this section shall be construed to prohibit the solicitation or collection of funds and contributions to be used for medical aid and assistance, or for food and clothing to relieve human suffering, when such solicitation or collection of funds and contributions is made on behalf of and for use by any person or organization which is not acting for or on behalf of any such government, but all such solicitations and collections of funds and contributions shall be in accordance with and subject to such rules and regulations as may be prescribed.

(c) Whenever any proclamation issued under the authority of section 1 (a) shall have been revoked with respect to any state the provisions of this section shall thereupon cease to apply with respect to such state, except as to offenses committed prior to such revocation.

AMERICAN REPUBLICS

SEC. 9. This joint resolution (except section 12) shall not apply to any American republic engaged in war against a non-American state or states, provided the American republic is not cooperating with a non-American state or states in such war.

RESTRICTIONS ON USE OF AMERICAN PORTS

SEC. 10. (a) Whenever, during any war in which the United States is neutral, the President, or any person thereunto authorized by him, shall have cause to believe that any vessel, domestic or foreign, whether requiring clearance or not, is about to carry out of a port or from the jurisdiction of the United States, fuel, men, arms, ammunition, implements of war, supplies, dispatches, or information to any warship, tender, or supply ship of a state named in a proclamation issued under the authority of section 1 (a), but the evidence is not deemed sufficient to justify forbidding the departure of the vessel as provided for by section 1, title V, chapter 30, of the Act approved June 15, 1917 (40 Stat. 217, 221; U. S. C., 1934 edition, title 18, sec. 31), and if, in the President's judgment, such action will serve to maintain peace between the United States and foreign states, or to protect the commercial interests of the United States and its citizens, or to promote the security or neutrality of the United States, he shall have the power, and it shall be his duty, to require the owner, master, or person in command thereof, before departing from a port or from the jurisdiction of the United States, to give a bond to the United States, with sufficient sureties, in such amount as he shall deem proper, conditioned that the vessel will not deliver the men, or any fuel, supplies, dispatches, information, or any part of the cargo, to any warship, tender, or supply ship of a state named in a proclamation issued under the authority of section 1 (a).

(b) If the President, or any person thereunto authorized by him, shall find that a vessel, domestic or foreign, in a port of the United States, has previously departed from a port or from the jurisdiction of the United States during such war and delivered men, fuel, supplies, dispatches, information, or any part of its cargo to a warship, tender, or supply ship of a state named in a proclamation issued under the authority of section 1 (a), he may prohibit the departure of such vessel during the duration of the war.

(c) Whenever the President shall have issued a proclamation under section 1 (a) he may, while such proclamation is in effect, require the owner, master, or person in command of any vessel, foreign or domestic, before departing from the United States, to give a bond to the United States, with sufficient sureties, in such amount as he shall deem proper, conditioned that no alien seaman who arrived on such vessel shall remain in the United

States for a longer period than that permitted under the regulations, as amended from time to time, issued pursuant to section 33 of the Immigration Act of February 5, 1917 (U. S. C., title 8, sec. 168). Notwithstanding the provisions of said section 33, the President may issue such regulations with respect to the landing of such seamen as he deems necessary to insure their departure either on such vessel or another vessel at the expense of such owner, master, or person in command.

SUBMARINES AND ARMED MERCHANT VESSELS

SEC. 11. Whenever, during any war in which the United States is neutral, the President shall find that special restrictions placed on the use of the ports and territorial waters of the United States by the submarines or armed merchant vessels of a foreign state will serve to maintain peace between the United States and foreign states, or to protect the commercial interests of the United States and its citizens, or to promote the security of the United States, and shall make proclamation thereof, it shall thereafter be unlawful for any such submarine or armed merchant vessel to enter a port or the territorial waters of the United States or to depart therefrom, except under such conditions and subject to such limitations as the President may prescribe.³ Whenever, in his judgment, the conditions which have caused him to issue his proclamation have ceased to exist, he shall revoke his proclamation and the provisions of this section shall thereupon cease to apply, except as to offenses committed prior to such revocation.

NATIONAL MUNITIONS CONTROL BOARD

SEC. 12. (a) There is hereby established a National Munitions Control Board (hereinafter referred to as the "Board"). The Board shall consist of the Secretary of State, who shall be chairman and executive officer of the Board, the Secretary of the Treasury, the Secretary of War, the Secretary of the Navy, and the Secretary of Commerce. Except as otherwise provided in this section, or by other law, the administration of this section is vested in the Secretary of State. The Secretary of State shall promulgate such rules

³ A Presidential Proclamation of November 4, 1939, declaring that special restrictions on belligerent submarines "will serve to maintain peace between the United States and foreign States, to protect the commercial interests of the United States and its citizens, and to promote the security of the United States," proclaims it unlawful for any submarine of the belligerents "to enter ports or territorial waters of the United States, exclusive of the Canal Zone, except submarines . . . forced into such ports or territorial waters by *force majeure*, and in such cases . . . only when such submarines enter ports or territorial waters of the United States while running on the surface with conning tower and superstructure above water and flying the flags of the . . . states of which they are vessels. Such submarines may depart from ports or territorial waters of the United States only while running on the surface with conning tower and superstructure above water and flying the flags of the . . . states of which they are vessels."—Department of State *Bulletin*, November 4, 1939, pp. 456-457.

and regulations with regard to the enforcement of this section as he may deem necessary to carry out its provisions. The Board shall be convened by the chairman and shall hold at least one meeting a year.

(b) Every person who engages in the business of manufacturing, exporting, or importing any arms, ammunition, or implements of war listed in a proclamation referred to in or issued under the authority of subsection (i) of this section, whether as an exporter, importer, manufacturer, or dealer, shall register with the Secretary of State his name, or business name, principal place of business, and places of business in the United States, and a list of the arms, ammunition, and implements of war which he manufactures, imports, or exports.

(c) Every person required to register under this section shall notify the Secretary of State of any change in the arms, ammunition, or implements of war which he exports, imports, or manufactures; and upon such notification the Secretary of State shall issue to such person an amended certificate of registration, free of charge, which shall remain valid until the date of expiration of the original certificate. Every person required to register under the provisions of this section shall pay a registration fee of \$100. Upon receipt of the required registration fee, the Secretary of State shall issue a registration certificate valid for five years, which shall be renewable for further periods of five years upon the payment for each renewal of a fee of \$100; but valid certificates of registration (including amended certificates) issued under the authority of section 2 of the joint resolution of August 31, 1935, or section 5 of the joint resolution of August 31, 1935, as amended, shall, without payment of any additional registration fee, be considered to be valid certificates of registration issued under this subsection, and shall remain valid for the same period as if this joint resolution had not been enacted.

(d) It shall be unlawful for any person to export, or attempt to export, from the United States to any other state, any arms, ammunition, or implements of war listed in a proclamation referred to in or issued under the authority of subsection (i) of this section, or to import, or attempt to import, to the United States from any other state, any of the arms, ammunition, or implements of war listed in any such proclamation, without first having submitted to the Secretary of State the name of the purchaser and the terms of sale and having obtained a license therefor.

(e) All persons required to register under this section shall maintain, subject to the inspection of the Secretary of State, or any person or persons designated by him, such permanent records of manufacture for export, importation, and exportation of arms, ammunition, and implements of war as the Secretary of State shall prescribe.

(f) Licenses shall be issued by the Secretary of State to persons who have registered as herein provided for, except in cases of export or import

licenses where the export of arms, ammunition, or implements of war would be in violation of this joint resolution or any other law of the United States, or of a treaty to which the United States is a party, in which cases such licenses shall not be issued; but a valid license issued under the authority of section 2 of the joint resolution of August 31, 1935, or section 5 of the joint resolution of August 31, 1935, as amended, shall be considered to be a valid license issued under this subsection, and shall remain valid for the same period as if this joint resolution had not been enacted.

(g) No purchase of arms, ammunition, or implements of war shall be made on behalf of the United States by any officer, executive department, or independent establishment of the Government from any person who shall have failed to register under the provisions of this joint resolution.

(h) The Board shall make a report to Congress on January 3 and July 3 of each year, copies of which shall be distributed as are other reports transmitted to Congress. Such reports shall contain such information and data collected by the Board as may be considered of value in the determination of questions connected with the control of trade in arms, ammunition, and implements of war, including the name of the purchaser and the terms of sale made under any such license. The Board shall include in such reports a list of all persons required to register under the provisions of this joint resolution, and full information concerning the licenses issued hereunder, including the name of the purchaser and the terms of sale made under any such license.

(i) The President is hereby authorized to proclaim upon recommendation of the Board from time to time a list of articles which shall be considered arms, ammunition, and implements of war for the purposes of this section: but the proclamation Numbered 2237, of May 1, 1937 (50 Stat. 1834), defining the term "arms, ammunition, and implements of war" shall, until it is revoked, have full force and effect as if issued under the authority of this subsection.

REGULATIONS

Sec. 13. The President may, from time to time, promulgate such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out any of the provisions of this joint resolution; and he may exercise any power or authority conferred on him by this joint resolution through such officer or officers, or agency or agencies, as he shall direct.

UNLAWFUL USE OF THE AMERICAN FLAG

Sec. 14. (a) It shall be unlawful for any vessel belonging to or operating under the jurisdiction of any foreign state to use the flag of the United States thereon, or to make use of any distinctive signs or markings, indicating that the same is an American vessel.

(b) Any vessel violating the provisions of subsection (a) of this section shall be denied for a period of three months the right to enter the ports or territorial waters of the United States except in cases of force majeure.

GENERAL PENALTY PROVISION

SEC. 15. In every case of the violation of any of the provisions of this joint resolution or of any rule or regulation issued pursuant thereto where a specific penalty is not herein provided, such violator or violators, upon conviction, shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

DEFINITIONS

SEC. 16. For the purposes of this joint resolution—

(a) The term "United States," when used in a geographical sense, includes the several States and Territories, the insular possessions of the United States (including the Philippine Islands), the Canal Zone, and the District of Columbia.

(b) The term "person" includes a partnership, company, association, or corporation, as well as a natural person.

(c) The term "vessel" means every description of watercraft and aircraft capable of being used as a means of transportation on, under, or over water.

(d) The term "American vessel" means any vessel documented, and any aircraft registered or licensed, under the laws of the United States.

(e) The term "state" shall include nation, government, and country.

(f) The term "citizen" shall include any individual owing allegiance to the United States, a partnership, company, or association composed in whole or in part of citizens of the United States, and any corporation organized and existing under the laws of the United States as defined in subsection (a) of this section.

SEPARABILITY OF PROVISIONS

SEC. 17. If any of the provisions of this joint resolution, or the application thereof to any person or circumstance, is held invalid, the remainder of the joint resolution, and the application of such provision to other persons or circumstances, shall not be affected thereby.

APPROPRIATIONS

SEC. 18. There is hereby authorized to be appropriated from time to time, out of any money in the Treasury not otherwise appropriated, such amounts as may be necessary to carry out the provisions and accomplish the purposes of this joint resolution.

REPEALS

SEC. 19. The joint resolution of August 31, 1935, as amended, and the joint resolution of January 8, 1937, are hereby repealed; but offenses com-

mitted and penalties, forfeitures, or liabilities incurred under either of such joint resolutions prior to the date of enactment of this joint resolution may be prosecuted and punished, and suits and proceedings for violations of either of such joint resolutions or of any rule or regulation issued pursuant thereto may be commenced and prosecuted, in the same manner and with the same effect as if such joint resolutions had not been repealed.

SHORT TITLE

SEC. 20. This joint resolution may be cited as the "Neutrality Act of 1939."

Approved, November 4, 1939, 12:04 p. m.

§ 192. RECENT NEUTRAL POLICIES OF THE UNITED STATES (Concluded):

The "Fallacies of Neutrality," by L. H. Woolsey

WITH INTERPOLATIONS BY THE EDITOR

30 *American Journal of International Law* (1936), 256-262.

(1) "It is a fallacy to believe that neutrality is an assurance against becoming involved in war," especially major wars in which sea power is important. The greater the commerce of the neutral State, the greater the danger of involvement. If all articles on contraband lists were embargoed [a possibility under Secs. 1 and 2 of the Act of 1937] "would the belligerents accept the effectiveness of the embargo and waive the right of visit and search, or would they charge laxity and insist on visit and search? . . . Even if all contraband traffic were prohibited, and all 'unneutral despatches' and 'unneutral persons' were eliminated from American vessels [compare Sec. 6, Act of 1937] it is overoptimistic to expect that belligerents would forego the right of visit and search to determine ultimate destination, blockade running, or unneutral conduct." Again, could the United States stay out of a war if its interests were involved, as in the Panama Canal, or the Philippines? The Acts of 1936 [1937, 1939] recognize that we would be partial to an American republic in a war between it and a non-American State. Again, public sentiment ordinarily takes sides [witness the World War, Ethiopia, Spain, China, and the European War of 1939]. "The economic injury of embargoes or the ruthless killing of Americans, although travelling at their own risk, are likely to cause a revulsion of feeling. Such feelings cannot be allayed by legislation or by the admonitions of the government. . . . Could our Government successfully deprive the people of such essential articles as rubber, nickel, tin, etc., from a belligerent in reprisal for our own embargo?" Finally, "this is not a world of automatic justice . . .

no country, unless it is willing to defend itself, is free from invasion of its rights. A nation which withdraws into its shell and says that there is no provocation which will cause it to fight does not deserve to be numbered among the free nations of the earth."

(2) "Another fallacy of neutrality is the thought that it *operates* impartially. [Italics are the editor's.] The configuration of the continents and of the countries into which they are divided, will always prevent the equal operation of the rules of neutrality . . . [The World War, Ethiopia, Spain, China and the European War of 1939.] Discretionary action in the application of embargoes ["Partiality"], therefore, in the hope of balancing the inequalities, could not reasonably succeed. Moreover, as authorities agree, to change the attitude of a neutral during the progress of a war is unneutrality itself and may lead to reprisals or other hostile action by the belligerent affected."

(3) "A third fallacy is that a country may be neutral and at the same time exercise discretion in determining the moral issues of a war, that is, in determining the aggressor, applying sanctions, or discriminating in the application of neutrality laws ["Partiality"]. Such discretion is the antithesis of neutrality. . . . It may, of course, be a fair question as to whether the policy of the United States should be based upon neutrality or partiality, but it cannot be based upon both. . . . The sanctionists believe that everyone should stand for what is conceived to be the right and that therefore neutrality is immoral. . . . On the other hand, a practical consideration is that the moral concept will lead countries to strive for self-sufficiency, to become armed camps, to prime the gun for another conflict. . . . The United States . . . in its legal concept of neutrality, may find itself in conflict with the moral concept applied by other nations . . . , and here also lies a danger of war. If the United States should insist on its ideas of neutrality and insist on trading with a belligerent contrary to sanctions imposed by other nations, the result might well become an armed conflict."

(4) "A fourth fallacy . . . is that while our attitude in the present [Italo-Ethiopian] conflict may tend to minimize our involvement, yet in a future war it may not come back to plague us. It is important that the United States should not establish a boomerang neutrality. . . . It is clear even now that the submarine and the airplane . . . are going to force a modification of the laws of neutrality in respect of blockade, visit and search, sinking of prizes, etc. . . . It is important . . . that the United States should not take a neutral position in the face of the developments in implements of warfare that have come to stay that would prevent it from using them in a war of its own in an effective though humane manner. The same thing is true of embargoes. Will countries against whom we embargo supplies return the compliment when we are at war? It has been said that . . . two thirds of

certain critical materials (such as rubber, manganese, nickel, chromite, tin, antimony, tungsten) come fifty percent from abroad. . . . Such articles would have to be carried largely in foreign neutral bottoms. No Government would last very long that by ill-considered action prevented the American people from obtaining supplies of necessary materials from a belligerent."

(5) "A fifth fallacy . . . is that the United States is free to modify its laws on the subject *ad libitum*. Aside from being bound by the laws and practice of nations in this regard, the United States is bound by several bilateral and multilateral conventions on the subject. Not to mention the Kellogg-Briand Pact of 1928 [§ 113], under which high authorities claim there is no longer any neutrality, there is the Convention of Maritime Neutrality of American States of 1928 [§ 178, footnotes], which lays down definite rules to be followed by neutrals and belligerents, the Hague Convention of 1907 on Rights and Duties of Neutral Powers in Naval War [§ 178], which have crystallized certain sections of international law of neutrality and which the United States is obligated to recognize and apply as the law of the land."

Mr. Woolsey concludes, in what is also a fitting conclusion for this book:

"The problem of neutrality today is an intricate and complex one. Is the United States going to assist in the conservative development of the old law in harmony with modern warfare at sea, or withdraw and give over the seas to the control of the belligerents, or discard neutrality altogether and embrace the moral concept of just and unjust wars?"

The discussion is full of portents for the peace of the United States and of the world. Probably no more important problem ever challenged the attention of a people.

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QUESTIONS AND PROBLEMS

Introduction

1. According to Professor Jessup (§ 173), what is the nature of neutrality? Did neutrality exist during the early Middle Ages? What did *neutre* mean in the

sixteenth century? What development took place in the seventeenth and eighteenth centuries? What is the importance of treaty obligations undertaken in the seventeenth century? Of the writings of publicists like Vattel? Of the policy of the United States under President Washington? Of the problems raised during the Napoleonic Wars? During the American Civil War? During the World War, 1914-1918? What are the most important international instruments covering the rights of neutrals and belligerents? Are any of them printed in this book? What are the main principles covered by these instruments? Is the concept of neutrality still of importance? Why should the acceptance of the Covenant and the Kellogg Pact have led to controversy on this score?

Has the development of the rules relating to neutral rights and duties on land led to controversies comparable to those arising from the development of rules relating to neutral rights and duties in maritime warfare? Can you suggest reasons for your answer?

Would you say that (1) impartiality by the neutral towards the belligerents or (2) abstinence by the neutral from all participation in the war, was the principal ingredient of neutrality? Explain your answer.

Would you say that the idea of neutral rights and duties is now irrevocably fixed, or that this idea is capable of further development? What light does Professor Jessup's article throw on this question?

"Traditional Neutrality"

2. Distinguish between neutral policy and "traditional neutrality."

3. Is it possible for a Member of the League of Nations to be "neutral" in a war between two other League Members (see §§ 133-137)?

4. What was the purpose of President Wilson's Proclamation of August 4, 1914 (§ 175)? Under what circumstances was it issued? What acts does the Proclamation forbid? What acts does it permit? Did the President make up this catalogue of acts on his own responsibility, or was he guided by Congress? Explain.

5. Would the following acts be legal under the President's Proclamation of August 4, 1914 (§ 175)?

(a) A, an American citizen, agrees with the British Consul in Chicago that he will go to Canada and enlist if the British Consul pays his transportation to Winnipeg.

(b) B, a British subject, makes a similar agreement.

(c) The C corporation makes a contract with the German government to manufacture shells and automobile engines in the United States and ship them to Germany.

(d) A British merchant vessel arrives in the port of New York, and makes arrangements to have an American concern strengthen its decks. It also buys from another American concern a number of three-inch guns, suitable for mounting on the strengthened decks.

(e) E, an American citizen, and D, a British subject, agree in Detroit that E will furnish the funds with which to charter a vessel which D will load with a cargo of petroleum at San Francisco. The petroleum is to be sold to British warships on the high seas.

(f) After Great Britain has declared a blockade of German coasts, F and G,

American citizens, form a partnership to run the blockade and get goods of all sorts into Germany.

6. "States X and Y are at war. Other states are neutral. There is a condition of political turmoil in state B, and the local authorities are weak and incapable of enforcing order within the territory of B.

"(a) A cruiser of X, the *Xane*, pursues a merchant vessel of Y, the *Young*, into a port of B. What action may it take there?

"(b) What action might be taken if the pursued vessel were a vessel of war of state Y, the *Yarrow*?

"(c) What action should the *Xane* take if it learns that a radio station belonging to State B is transmitting military messages for the *Yarrow*?"—Naval War College, *International Law Situations* (1932), p. 1.

7. "States X and Y are at war. Other states are neutral.

"(a) The *Xerxes*, a cruiser of State X, is refueling from the *Petro*, a tanker, in quiet water more than 3 miles from the coast of State R, the only state within 100 miles, but inside and more than 3 miles from a reef off the coast of State R. The reef is generally submerged, but certain rocks are exposed at low tide. State Y protests to State R. State R takes no action upon the protest. A submarine, *Y 50*, of State Y, then sinks the *Petro*. The *Y 50* is brought to the surface by depth bombs from the *Xerxes*, but succeeds in beaching itself on a reef less than 3 miles from State R. The *Xerxes* takes off the crew of the *Y 50* and makes them prisoners of war.

"Have States X, Y, and R grounds for protest?

"(b) Later the *Xenophon*, a companion ship of the *Xerxes*, runs upon the reef at a point $6\frac{1}{2}$ miles from any point of State R. A salvage ship flying the flag of and belonging to a corporation of State R is endeavoring to get the *Xenophon* off. A submarine of State Y, the *Y 51*, appears and demands that salvaging operations cease, that the crew of the *Xenophon* be taken on board the salvaging ship as *Y 51* is about to destroy the *Xenophon* by torpedo fire. A cruiser of State R is standing by, and the *Xenophon's* armament and boats are intact. What action?"—Naval War College, *International Law Situations* (1931), p. 94.

8. "States X and Y are at war. Other states are neutral. An aircraft carrier of State X enters a port of State Z with 10 aircraft on board.

"A cruiser of State X has on board a disabled aircraft which it desires to transfer to the carrier in exchange for an aircraft in good condition, and to take from the aircraft carrier aircraft fuel and certain parts for repairing disabled aircraft.

"May State Z legally decline to permit within its jurisdiction the transfer of the aircraft or the supply of aircraft fuel or parts?"—Naval War College, *International Law Situations* (1926), p. 89.

9. There is a war between Japan and China. Other States are neutral. Under the Hague Convention (V) (§ 178), what would be the rights of the several States in the following situations?

(a) A Japanese concern established before the war a radio station on Russian territory. During the war Japanese agents seek to send code messages containing military information to Japan at this station.

(b) After a battle, 5,000 Chinese refugees, troops and civilians, flee across the border into Russia.

(c) Japan seeks permission to transport a large number of wounded Japanese soldiers wounded in China back to Japan via Vladivostok.

(d) Russia forbids the export of munitions to both belligerents.

(e) Japan requests Russian permission to transport three army divisions into China via Vladivostok.

(f) Japan seizes rolling stock of a Russian railway found in Chinese territory occupied by Japanese troops.

(g) An American citizen in the part of China occupied by Japanese troops assists Chinese prisoners to escape. He is executed by the Japanese after court-martial. The United States protests.

10. "States X and Y are at war. Other states are neutral. . . .

"(a) The *Swan*, a merchant vessel lawfully flying the flag of State X, enters a port O of the United States, where it remains one week discharging and loading cargo. The decks of the *Swan* have been strengthened for the mounting of 5-inch guns, and the *Swan* from time to time communicates by radio with a division of the fleet of State X to the north and with a division of the same fleet to the south of port O.

"(b) The *Sparrow*, a merchant vessel lawfully flying the flag of State Y enters port O of the United States and the owner contracts with a shipbuilder for the strengthening of the decks of the *Sparrow* so that she might mount a 5-inch gun. The same shipbuilder has, since war was declared, made contracts with a citizen of State X and with a citizen of State Y to build for each a merchant vessel with decks of such strength as to mount a 5-inch gun and also to build for each a merchant vessel of such construction as to make easy the transformation of these vessels to aircraft carriers.

"(c) Merchant vessels of State X and of State Y having decks strengthened to mount 5-inch guns and adapted for launching aircraft appear at opposite ends of the Panama Canal for the purpose of passing through and maintain that even if regarded as vessels of war they would have the same privileges as in the Suez Canal; and vessels of war of State X enter the Gulf of Fonseca and without going within 3 miles of land await several days the arrival of other vessels of war and auxiliaries. Meantime aircraft from vessels of war of State X fly regularly over the State of Panama between the fleet of State X in the Caribbean Sea and the vessels in the Gulf of Fonseca.

"State Y protests against the sojourn of the *Swan* at port O. (Under [a] above.)"

"State X protests against the carrying out of the contract on the *Sparrow* at port O and the shipbuilder is in doubt as to the lawfulness of fulfilling his contracts with the citizens of States X and Y. (Under [b] above.)"

"The authorities at Panama desire to conform to the laws of neutrality. (Under [c] above.)"

"What should be done in each case? Why?"—Adapted from Naval War College, *International Law Situations* (1929), p. 1.

11. States X and Y are at war. The United States is neutral. A squadron of six State Y cruisers appears off the port of Boston and requests permission to take on additional crew, a full store of provisions, and as much coal as can be taken on board. At the time there are a State Y submarine and three State Y merchantmen in the harbor. What action should the American authorities take?

12. "States X and Y are at war. Other States are neutral. An act of Congress of the United States, February 19, 1895, provided for the delimitation of the high seas from rivers, harbors, and inland waters. Lines were later drawn on maps published in accordance with this authorization. Some of these lines were 10 miles off the coast.

"(a) (1) The *Lark*, a vessel of war of X, passes within these outer lines and when 8 miles off the coast summons merchant vessels of the United States and of other States to stop for visit and search. The master of each of these vessels appeals for protection to the authorities of the United States on the ground that the vessels are within the lines drawn under the act of 1895.

"(2) The *Thrush*, a vessel of war of Y, attacks the *Cygnnet*, a vessel of war of X, on the following day at the same location, and the commander of the *Cygnnet* protests on the ground that his vessel is in neutral waters.

"(b) The *Cygnnet* by gunfire drives the *Thrush* 12 miles off the coast. The *Thrush* continues the battle using dangerous gas. Some of this gas floats within 3 miles of the United States and life there is endangered.

"(c) Later the *Thrush*, still having a large amount of dangerous gas on board, is about to enter a harbor of the United States. The port authorities decline to permit entrance with the gas on board. The commander of the *Thrush* protests, as he is short of fuel to continue his voyage to a home port.

"What action should the authorities of the United States take in each case?"
—Naval War College, *International Law Situations* (1928), p. 1.

13. "States X and Y are at war. Other states are neutral.

"(a) State D in its proclamation of neutrality forbids entrance to its waters to all belligerent vessels except strictly private merchant vessels upon the surface.

"(1) The *West Wind*, a passenger vessel belonging to a citizen of State X, having on board among its passengers 100 soldiers on its regular voyage along the coast passes within 3 miles of D and is there seized by a vessel of war of D and the vessel and soldiers are interned.

"(2) The *Porpoise*, a submarine belonging to State Y, but engaged in merchant service, is caught in a net 1 mile offshore of D and enters a port of D in distress. The port authorities intern the submarine.

"(3) The *East Wind*, a merchant vessel belonging to a private citizen of Y, is captured by a cruiser of X and a prize crew is put on board. The radio upon the *East Wind* becomes disabled and the vessel enters a port of D. The authorities of D intern the prize crew, allow the repairs, and release the *East Wind*.

"(b) State E has merely declared that it would maintain its neutrality.

"(1) The *Athens*, a merchant vessel owned by a citizen of State F, sails from a port of E, having cleared for its home port. En route and on the high seas the *Athens* meets war vessels of X and sells to these vessels the fuel and provisions which it has on board. The *Athens* then returns to State E and takes on board fuel and provisions to replace those sold.

"(2) The *King*, one of the vessels of war of Y, enters a port of E and the commanding officer goes ashore and sends to and receives from the fleet outside through the regular radio station messages in regard to the war.

"(3) The second day afterwards the *Prince*, another vessel from the fleet, enters the same port and its commanding officer sends and receives similar messages as well as ordinary cable messages.

"States X and Y, when adversely affected, protest that their rights under the

laws of neutrality have not been respected. Are the protests well grounded? Why?"—Naval War College, *International Law Situations* (1929), p. 106.

14. Discuss the case of the *Appam* (§ 179). Do you think the judgment of the court states international law, or only the position of the United States on a question of international law? Explain your attitude.

15. States X and Y are at war. Other States are neutral. What positions may the States legally take in the following situations:

(a) The *Wasp*, an American merchantman, is captured by a State Y destroyer for running a State Y blockade, and is condemned by a prize court held on board the destroyer on the high seas.

(b) The *Hornet*, a merchantman of State Z registry, is captured by a State X cruiser, and is brought into New Orleans pending its disposition by a prize court in State X. State Y having effectively blockaded State X, it would in fact be impossible for the prize to be taken to any port in State X during the war.

16. Do the principles of the Declaration of Paris (§ 180) apply to the following situations, and if so, how? To the extent that the Declaration does not apply, are the ships and cargoes capturable? States X and Y are at war, State Z being neutral. A State X cruiser encounters:

- (a) State Y merchantman, laden with noncontraband State Y cargo.
- (b) State Y merchantman, laden with contraband State Y cargo.
- (c) State Y merchantman, laden with noncontraband state Z cargo.
- (d) State Y merchantman, laden with contraband State Z cargo.
- (e) State Z merchantman, laden with noncontraband State Y cargo.
- (f) State Z merchantman, laden with contraband State Y cargo.
- (g) State Z merchantman, laden with noncontraband State Z cargo.
- (h) State Z merchantman, laden with contraband State Z cargo.
- (i) State X merchantman, laden with noncontraband State Y cargo.
- (j) State X merchantman, laden with contraband State Y cargo.
- (k) State X merchantman, laden with noncontraband State Z cargo.
- (l) State X merchantman, laden with contraband State Z cargo.

Which of these situations involves questions of trading with the enemy?

What difference would it make if the State X cruiser encountered these ships after State X had declared a legal blockade of State Y ports, and the ships were all trying to run the blockade?

17. What is the importance of the Declaration of London (§ 181)? Is there any question raised in any of the problems in Chapter XVIII, upon which the provisions of this Declaration do not touch?

18. What were the facts before the Court in the case of the *Peterhoff* (§ 182)? What questions of law did these facts present? How were these questions decided? Does the Court come to its conclusion because the *Peterhoff* was running the blockade, or because it was carrying contraband? Does the Court discuss both possibilities?

What was the destination of the *Peterhoff*, in the opinion of the Court? Was this destination in a belligerent or a neutral State? Was this destination blockaded? Could it be blockaded? What established the scope of the blockade? Would this method of establishing the blockade conform to the requirements of the Declaration of London (§ 181)? What would have been the disposition of the ship and cargo if the Court had found otherwise on this question? Would

this disposition have agreed with the rules laid down in the Declaration of London?

In the opinion of the Court, was the destination of the neutral cargo the same as the destination of the *Peterhoff*? Was this question a question of blockade? What is the question of "ulterior destination"? Was this a question of blockade? What is meant by the term "contraband"? What are the different classes of contraband mentioned by the Court? What are the different rules applied to these classes? Can there be contraband without an enemy destination? Does the Court's discussion of these points correspond with that in the case of the *Prometheus* (§ 5)? With the rules in the Declaration of London (§ 181)? With the rules applied in the case of the *Carthage* (§ 184)?

Was the whole of the cargo of the *Peterhoff* one class of contraband? Was all of it condemned? What part of it was condemned? Why? Could the Court have condemned these goods if they had not had a destination in the United States? Did the papers show these goods to be destined to a place in the United States? How did the Court reach its conclusion that the condemned goods had a destination beyond Matamoras? State as well as you can the rule of ultimate or ulterior destination applied by the Court in this case to the contraband. Is this the rule of the Declaration of London on this point? Does it have any relation to the rule applied in the case of the *Kim* (§ 185)? Is it a rule that always works to the advantage of the United States?

What disposition did the Court make of the part of the cargo belonging to the owner of the contraband? Of the question of costs and expenses? What is the purpose of the discussion of the suspicious conduct of the captain of the *Peterhoff*? Check the rules laid down on these points with other documents in this book, especially the Declaration of London.

19. Make a brief of the case of the *Adula* (§ 183).

20. On the basis of all the materials you can find in this book, write a summary of the rules of blockade.

21. States X and Y are at war. Other States are neutral. The *Northern Star*, an American merchant vessel owned by a New York firm, is captured by a cruiser of State X 250 miles out from a port in State Y which State X has blockaded. The *Northern Star* has a cargo of goods which State X has declared contraband. In the prize court of State X, the American owners contend (a) that the destination of the ship was a port in State Z, as shown by the ship's papers; (b) that the destination of the goods was also a port in State Z, as shown in the papers; (c) that the ship had no knowledge of the blockade, having left New York only an hour after the declaration of war. The captors contend (a) that the ship was captured 100 miles off the course shown by the papers; (b) that the ship had a radio apparatus, and consequently must have had knowledge, not only of the existence of war, but also of the proclamation of blockade, made two days later, and the list of contraband, published three days later; (c) that during the considerable delay while the *Northern Star* was awaiting adjudication in State X, two other ships owned by the same concern, which sailed from New York after the existence of war and proclamations of blockade and of contraband lists were fully known, had been adjudged good prize.

Decision and reasons?

22. "States X and Y are at war. Other states are neutral.

"(a) The *Bee*, a vessel of war of State X, visits and searches the *Gull*, a

passenger and mail vessel of State O. The commander of the *Bee* finds all the papers regular and the vessel apparently innocent, but from information in his possession is led to suspect that the mail pouches on board may contain contraband or other articles which will be of service to the enemy. He can not take the *Gull* in or spare a prize crew to take it in.

"(b) The *Bee* later hears an aircraft having neutral markings and from information in his possession the commander of the *Bee* is led to suspect that the aircraft has mail pouches on board which contain contraband or other articles which will be of service to the enemy. He signals to the aircraft to alight, but the aircraft does not change its course and is rapidly passing beyond the range of his antiaircraft guns.

"What may the commander of the *Bee* lawfully do in each case?"—Naval War College, *International Law Situations* (1928), p. 40.

23. "States X and Y are at war. Other states are neutral. A cruiser of X meets a private merchant vessel flying the flag of State Z. The papers of the vessel show that port O in State Y is the last port of call for the merchant vessel. The vessel has the following cargo: One-sixth raw molasses and one-sixth petroleum, consigned to port P in State N; one-eighth iron ore and one-eighth fancy goods, consigned to port Q in State R; one-eighth fancy shoes for ladies, one-eighth golf suits for men, one-sixth valuable art-rug specimens for national museum, consigned to port O.

"The master of the merchant vessel of State Z maintains that his vessel and cargo are not liable to seizure because of ratio and list of goods, consignment to neutral ports, geographical location of ports with reference to belligerents, and because the papers on board include a certificate of innocent character of goods from authorities of Z as well as a letter of assurance from the consul of Y at the port of departure.

"Are these grounds sufficient to exempt the merchant vessel from liability to seizure?"—Naval War College, *International Law Situations* (1927), p. 1.

24. What were the facts before the Court in the case of the *Kim* (§ 185)? What question of law did these facts present? How was this question decided? Upon what evidence did the court proceed in reaching its conclusion as to the destination of the cargoes? Is its reasoning on this point plausible?

Does the method of reasoning used by the Court really prove that the cargoes in the ships before the Court had an enemy destination? Might it be possible that these particular cargoes, despite the statistical evidence as to the enemy destination of the generality of shipments of this sort, had an innocent destination?

Compare the method of proving destination in this case with that set forth in the Declaration of London (§ 181). Is it the same? Which method do you think would lead to the most accurate results, bearing in mind that a court is always dealing with specific ships and specific cargoes? What objections can you see to the use of the method set forth in the Declaration of London?

Do you suppose the United States regarded the judgment in the *Kim* with favor? Was the United States in the best possible position to object? Explain your answer.

25. "States X and Y are at war. Other states are neutral.

"(a) State X declares that all distinction between conditional and absolute contraband is abolished and that all goods bound for Y will be treated as contraband.

"(b) State Y declares all ports of X blockaded and maintains a line 3 miles off the coast of State D to prevent vessels passing up the River Dana, which is the sole navigable waterway through State D to the capital of State X.

"What are the rights of the belligerents and of the neutrals?"—Naval War College, *International Law Situations* (1933), p. 1.

26. "States X and Y are at war. Other States are neutral. The *Alta*, a private merchant vessel lawfully flying the flag of State Z, is bound for a port of State B, a State bordering on State Y. The *Alta* is visited on the high sea by a cruiser of State X. The cruiser finds on board fodder suitable for stock raised in State B. The supply of this fodder would, however, make possible the exportation of additional animal products from State B to State Y. The cruiser captures the *Alta*, alleging continuous voyage through substitution. Should the capture be sustained?"—Naval War College, *International Law Situations* (1926), p. 1.

27. What is meant by the doctrine of continuous voyage? By the doctrine of ulterior destination? Write an essay on the relationship between these two doctrines.

28. What were the facts in the case of the *Leonora* (§ 186)? What questions of law were presented by these facts? How were these questions decided?

What were the provisions of the Order in Council under discussion in this case? Did they present a question of blockade? Did the Judicial Committee discuss them as presenting such a question? Did the Order present a question of contraband? Did the Judicial Committee regard the question as one of contraband? Was any question of unneutral service raised or decided on the facts before the Judicial Committee? What was the basis of the judgment?

Is retaliation provided for in the Declaration of London (§ 181)? What is the nature of retaliation? What branch of the government is to determine when retaliatory measures are necessary? Would a prize court review this determination: i.e., would a prize court examine the circumstances leading to the issuance of a retaliatory Order, and declare that these circumstances did not justify the issuance of the Order? What is the importance of the reasoning of the Judicial Committee on this point? Are any limits suggested on the exercise of the right of retaliation?

Supposing such a right of retaliation to exist, what is likely to be the future role of the recognized rules of blockade? Of contraband? Of unneutral service?

29. What were the facts submitted to the Tribunal of Arbitration in the case of the *Manouba* (§ 187)? What points of international law had to be decided? How were they decided? What were the reasons?

What should the commander of the *Agordat* have done, according to the award?

30. Compare the award in the case of the *Manouba* (§ 187) with the provisions of Chapter III of the Declaration of London (§ 181). Are they in substantial agreement? If States X and Y are at war and other States are neutral, what are the rights of the respective States in the following situations:

(a) Upon searching a merchant vessel of State Z registry, the officers of a cruiser of State Y discover that one of the stokers has sewn in his trousers despatches from a State X general to the State X minister of war.

(b) The cruiser of State Y then encounters a vessel of State A registry with evidence on board that it has supplied an airplane carrier of State X with fuel and provisions on the high seas.

(c) The cruiser of State Y then encounters a vessel of State B registry whose record of radiograms shows relaying of messages between different squadrons of the State X fleet.

(d) The cruiser of State Y then encounters a vessel of State C registry whose course, cargo, passengers, crew, and destination appear perfectly innocent, but whose papers include records showing that at the conclusion of her next voyage she will be chartered by the State X government.

31. "States X and Y are at war. Other states are neutral. The *Bee*, a vessel of war of State X, meets the *Nemo*, a merchant vessel belonging to a citizen of State N and flying the flag of N, and bound for a port of Y. The *Bee* brings to the *Nemo* and visits and searches the merchant vessel. The cargo is innocent and the vessel on a regular voyage. There are on board certain passengers.

"(a) Ten of these passengers are citizens of State Y of the age and capacity that would be called for military service.

"(b) Ten of the passengers are citizens of neutral states but are well known to have been trained as aviators.

"(c) Five are women citizens of State Y, but experienced aviators.

"(d) Ten of the crew of 20 were born in State Y and have previously served in the navy of State Y, though 5 of these are naturalized citizens of N.

"The commander of the *Bee* is convinced that the *Nemo* is innocent of carriage of contraband and is not bound for a blockaded port. He can not take the *Nemo* in or spare a prize crew to take it in, but decides to take off the passengers mentioned in (a), (b), and (c), and 10 members of the crew mentioned in (d). State N protests.

"What action would be legally correct in each case?"—Naval War College, *International Law Situations* (1928), p. 73.

Policy of States towards Foreign Civil Wars

32. What is the bearing of the Havana Convention on Duties and Rights of States in the Event of Civil Strife (§ 188) on the concept of "traditional neutrality"? Would the United States have to proclaim its neutrality in case of civil strife in Brazil if the provisions of this Convention are to apply?

If this Convention had been ratified by Spain, what would have been the obligations of the United States in the Spanish Civil War? How would these have compared with the position actually taken by the United States (see § 191)? With the provisions of the 1937 "Neutrality Act" (see § 191)? The 1939 "Neutrality Act" (§ 192)?

What are the general obligations of one State when a civil war breaks out in a friendly State? (Compare §§ 22, 32, and 33.)

33. During the civil war in Spain, the following incident was reported in *Time*, August 10, 1936:

"High over Berkane, border town in French Morocco, sounded the mighty roar of airplane motors last week. A flight of huge bombing planes was boring west toward the Spanish border. Suddenly engines choked, sputtered for lack of gasoline. One plane dropped into the sea. Another smashed up on landing, killing the pilot, two members of the crew and seriously injuring another. A third got down safely, but with empty tanks.

"The planes were Italian Savoia-Marchetti bombers with their identifica-

tion marks carefully painted out. Each was jammed with cases of machine guns, ammunition, hand grenades, machine-gun belts. Near one of the planes were found several knapsacks containing the khaki uniforms of Spain's Foreign Legion. The eleven aviators arrested by the French were all in civilian clothes, carried civilian Italian passports, but in their pockets were receipted pay checks giving their names and rank in the Italian Air Force. Later reports showed that the planes were part of a flight of 21 that had tried to fly nonstop the 780 miles from Italian Sardinia to Spanish rebel forces in Morocco. Eighteen of them reached Melilla, Spanish Morocco, successfully. . . . The Savoia-Marchetti factory is an Italian Government factory."

Suppose the facts as reported to be correct. What questions of international law are raised? What are the rights of (a) the Spanish government; (b) the Spanish rebels; (c) Italy; (d) France?

Recent "Neutral Policy" of the United States

34. After reading carefully Mr. Warren's article, "Troubles of a Neutral" (§ 189), compare *each* of the proposals of Mr. Warren with existing international law as revealed in other documents. Each member of a class will have enough to do if he does this with *one* of Mr. Warren's proposals. Does Mr. Warren emphasize neutral rights? If the United States adopted all of Mr. Warren's proposals in advance of a war between States X and Y, and the war broke out, could State X then hold the United States responsible for any failure of the United States to apply the new legislation strictly to State Y? What is the significance of your answer?

35. Compare Mr. Warren's proposals (§ 189) with the 1937 and 1939 neutrality legislation (§§ 191, 192) of the United States. Which proposals of Mr. Warren have been adopted? Which proposals have not been adopted? Can you suggest substantial reasons for the differences?

36. Examine carefully the various measures of the President taken in connection with the Italo-Ethiopian "war" (§ 190). To what extent were these measures authorized by the statute? To what extent were they not authorized?

37. Compare the list of "arms, ammunition, and implements of war" in the President's Proclamation of October 5, 1935 (§ 190), with the lists of contraband in the Declaration of London (§ 181). What bearing does the new American neutral policy have on the older concept of contraband?

38. Compare in some detail the sanctions imposed by League States on Italy (§ 136) and the use of the applicable neutrality legislation of the United States in the Italo-Ethiopian "war." What did the League States do that the United States did not do? What did the United States do that the League States did not do? Would you say that the net result in this case was (a) complete co-operation by the United States with League Members? (b) complete failure of the United States to co-operate with League Members? (c) partial co-operation by the United States with League Members? Explain your answers.

39. Do you think it would be possible for the United States to stay out of a war by operating under the type of neutrality embodied in the 1939 legisla-

tion, if a war broke out between Germany, Italy, and Japan on the one side and France, England, and Russia on the other? Explain your answer.

40. Would the United States be better able to stay out of the war in Problem 39 above, if Mr. Warren's proposals were all enacted into law? Explain your answer.

41. States X and Y are at war, and other States are neutral, including the United States. What would the United States do in the following situations (a) under pre-1914 international law; (b) if all the Warren proposals were enacted into law; (c) under present (1939) neutrality legislation:

(1) A merchant submarine of State Y registry appears in the port of Boston.
(2) A merchant vessel of State A loads up with contraband destined for State X, in San Francisco.

(3) An airplane ordered by the Government of State X and manufactured in New Jersey is about to fly to State X.

(4) The Britannia Trust Company of New York agrees to sell a two-billion-dollar bond issue in the United States.

(5) The *Red Queen*, a State Y merchantman, is torpedoed without warning on the high seas by a State X submarine, sacrificing the lives of 132 American citizens.

(6) The *White Rabbit*, a merchantman of State D registry, chartered to State Y, arrives at New Orleans.

(7) Reservists enrolled in the State Y army take passage from New York for State Y on a merchantman of State E registry.

(8) A merchantman of State X registry deceives a State Y submarine by flying the American flag on the high seas; when the submarine rises to visit and search the vessel, masked guns on the vessel destroy the submarine.

(9) State X places all goods on her list of absolute contraband.

(10) Venezuela joins State X in the war, and seeks to buy munitions and to float a loan in the United States.

(11) A State X merchantman, armed with four 6-inch guns, enters New York harbor to take on a cargo of airplanes.

42. Debate this question: *Resolved*, That for the United States the policy of co-operating with other States to punish an "aggressor," offers for the United States a better guaranty of peace than (choose *one*): (a) neutrality under the 1937 legislation; (b) neutrality under the 1939 legislation; (c) neutrality on the Warren plan; (d) "traditional neutrality."

Index

(Cases cited in reprinted cases are not indexed; those in Notes by the Editor are indexed.
All references are to pages.)

- Abandonment, 203-204
Abyssinia. *See* Ethiopia
Accretion, 193, 206-208
Act of War. *See* Resort to War
Adee, A. A., 99, 103-104
Adula, The. Text, 921-928
Advisory Opinions. *See* Permanent Court of International Justice
Aerial Navigation, Convention on.
 Text, 300-307
 and nonrecognized States, 112-113
Aggression
 in Geneva Protocol, 589-590
 Italo-Ethiopian conflict, 674-684
 under Kellogg Pact, 549-550
 under League Covenant, 562-566, 662-684
 U. S. policy and, 973-975, 979-985
Agreements, international. *See* Treaties
Aircraft
 belligerent ("combatant"), 787
 belligerent and neutral duties concerning, 795-796, 872, 873, 874
 belligerent authority over enemy and neutral aircraft, 792-795
 bombardment by, 788-792, 980-981
 and espionage, 792
 International Commission for Air Navigation, 305-307
 jurisdiction over, 300-307, 786-787
 as means of sanitary transportation, 777-778
 nationality of, 301-302, 786
 prohibited transport, 304
 state, 305, 785-786
 and tracer and incendiary bullets, 787-788
 use of in war, 781, 785-799
 visit and search, capture, condemnation, 796-799
Alabama Claims Award. Text, 863-868; 850
Åland Islands, 66
Albania
 annexation by Italy, 654-655
 in World War, 693
Aliens. *See also* Responsibility of States
 admission of, 356
 expulsion of, 357
 principle of equality, 357
 subjection to local jurisdiction, 357
Allen, E. W., 52
Alliance, treaties of, 667-668
Altman v. U. S., 466-467
Ambassadors, ministers, *chargés d'affaires*, etc.
 See Diplomatic agents
American Banana Co. v. United Fruit Co.
 Text, 212-215
American Law Institute, 222
Angarica Case, 178
Anna, The. Text; 206-208
Anschluss. *See* Austria
Antelope, The, 48
Anti-Smuggling Act (U. S.), 228
Anti-War Treaty of Non-Aggression and Conciliation, 596-597
Appam, The. Text, 877-883; 876
Arbitration, 547-548, 554-558, 563-564. *See also* Permanent Court of Arbitration
 General Act, 593-594
 Geneva Protocol, 586-588
 Treaties of U. S., 598-600, 602-609
Argentine Republic as federal union, 59
Arkansas v. Tennessee. Text, 237-245
Armed intervention without war, 623
 U. S. in Haiti, 640-652, 652-655
Armed merchantmen
 entry into neutral ports, 875-876
 entry into U. S. ports, 960, 979, 994
 and submarines, 814-815, 824-825, 833
 U. S. prohibited, 979, 991
Armed neutrality, 8, 850

- Armenia, 63
- Armistice
 effect of on private rights, 343
 Hague convention on, 765-766
 and termination of legal war, 705
- Arms, ammunition, implements of war. *See also* Contraband
 "cash and carry," 985, 987-989
 export prohibited as League sanction, 676-677
 export prohibited by U. S., 959-960, 971-985, 998-1000
 export prohibited on U. S. ships, 960, 978, 987-989
 League Covenant and, 562
- Armstrong, H. F., 856, 974
- Assassins, war, 762
- Asylum, 406, 416
- Australia as federal union, 59
- Austria
 annexation, 654-655
 debt, 329-331
 Germany and Austrian debt, 336-337
 independence, 49
 minorities treaty, 63
- Austria-Hungary
 as real union, 59
 continuity of, 326
- Auto-limitation theory, 11-12, 16-17
- Avulsion, 237-245
- Bailey, T. A., 823
- Baiz, *In re*. Text, 428-435; 436
- Balloons, discharge of explosives and projectiles from, 771-772
- Bank of Ethiopia v. National Bank of Egypt and Liguori*, 130
- Bar, L. von, 222
- Baron Frederic de Born, Case of, 177
- Bays, 230-238
- Beale, J. H., 222
- Bechuanaland, as protectorate, 72
- Belgium
 and Congo Free State as personal union, 59
 as neutralized State, 66
- Bellemans, 718
- Belligerency, 134-137, 663, 666-669, 693-699, 703-704, 710-746, 953-954
- Belligerent vessels in neutral ports, 860-862, 874-877, 961-962, 979, 983, 994
- Ben Tillett's Case, 356-357
- Berizzi Bros. v. Pesaro*. Text, 262-265; 122, 245
- Biddle v. U. S.*, 281
- Bigelow v. Princess Zizianoff*. Text, 444-451
- Blockade, war. *See also* Pacific blockade
 aircraft and, 796-798
 as beginning of war, 703-704
 binding character (Declaration of Paris), 890-892
 in civil war, 693-699, 911-917
 de facto, 921-928
 destination and, 897, 911-917
 in European War of 1939, 895
 knowledge of, 896, 925-928
 and pacific blockade, 638-639
 rules of (Declaration of London), 894-897
 in Sino-Japanese Conflict, 980-981
 in World War, 894-895
- Boedes Lust*, The. Text, 627-629; 702
- Boffolo Case, 357
- Bohemia and Moravia
 as "protectorate," 72-73
 nonrecognition by U. S., 104
- Bombardment
 from the air, 771-772, 788-792
 naval, of coast towns, 808-810
 of undefended towns, 752, 764
- Borchard, E. M., 131, 355, 549, 731, 732, 823, 831, 857
 on international law, 3-14
 on liability to military service, 179
- Bremen* Incident, 356, 391-394
- Brierly, J. L.
 on basis of obligation of international law, 14-17
 on binding force of treaties, 461 n., 465
 on equality of States, 48, 49
 on extradition of nationals, 508-509
- Briggs, H. W., 107, 138, 626, 790, 842, 856
 on members of international community, 49
- British Commonwealth of Nations, 49, 52-56, 59
- Brodsky Incident, 394
- Brown Claim, 338
- Brown, P. M., 281
- Brown v. U. S.*, 730
- Brussels Resolutions, 94, 96, 97
- Bryan Treaties, 595, 599, 601, 603-609
- Budapest Articles of Interpretation, 549

- Buell, R. L., 856
- Bulgaria, 63
under Turkish suzerainty, 74
- Cable Act. *See also* Nationality of women
Text, 160, 161-162, 163
- "Calvo clause," 356, 369-378
- Calvo doctrine, 661
- Caminelli v. Capelli*, 476
- Canada as federal union, 59
- Canals, international, 269-277
- Canevaro Case, 177
- Captures
by aircraft, 796-799
exemptions from, 817, 820-822
in neutral jurisdiction, 862, 872
of enemy vessels, 818; crews, 821-822
of national vessels, 820
of neutral vessels, 818-820. *See also* Blockade, Contraband, Unneutral service, Retaliation, Visit and search
- Carthage, The*. Text, 928-931
- Casablanca Arbitration, 281
- "Cash and carry," 985, 987-989
- Cassius, The*, 265
- Castioni, *In re*. Text, 534-537; 538
- Cayuga Indian Claim, 75, 76
- Central American Convention for Establishment of Commissions of Inquiry, 596
- Cession, 193, 208-211
- Chamberlain's Settlement, *In re*, 177
- Charlton v. Kelly*. Text, 479-482; 507-508
- Charteris, A. H., 286
- Cherokee Nation v. Georgia*, 75
- China
extraterritoriality, 281
and Manchukuo, 109
Sino-Japanese conflicts, 1931, 1937, 979-981
- Chinese Exclusion Case, 356
- Chung Chi Cheung v. The King*. Text, 254-261
- Church v. Hubbard*, 227, 228-229
- Citizenship. *See* Nationality
- Civil War. *See also* Belligerency, Insurgency, Spanish Civil War
attitude of outside States, 952-955, 976-979
beginning of, 693-698, 703-704
- Claims. *See* Responsibility of States
- Clark v. Morey*, 725
- Closure of insurgent ports, 138-139, 693-699
- Coast fishing vessels, 29-33, 821
- Cobbett, Pitt, 762, 764, 766, 812, 841
on suzerainty, 74
on termination of war, 704-705
- Codification of International Law. *See also*
Hague Conference for Codification of International Law, Hague Conventions and Declarations, Declaration of Paris, Declaration of London, Harvard Draft Conventions, and special subjects
in general, 7-11, 484-487
aerial navigation, 300-307
diplomatic officers, 403-409, 411
gas in war, 769-771
immunity of state-owned ships, 265-266
nationality, 174-175, 177, 178-179, 182-186
Red Cross Conventions, 773-781, 835-839
responsibility of States, 351-354
submarine war, 834-836
territorial sea, 222-227
- Coenca Bros. v. Germany*, 790
- Collins v. Loisel*, 533
- "Combat areas," 985, 990-991
- Combatants ("belligerents")
aircraft as, 787
armed merchantmen (*q. v.*), 814-815, 875-876
converted merchantmen, 813-814
persons as, 752, 756-757
privateers, 813-814
- Commercial Cable Co. v. Burleson*, 705
- Commissions of inquiry, 546, 552-566, 594-595
- Compagnie Générale des Asphaltes de France*
Case, 138-139
- Competence of courts in regard to foreign States, 269
- Conciliation, 546, 563
U. S. treaties, 594-597
- Conflict of laws. *See* Private international law
- Congress of Vienna, Rules of, 411
- Conquest, 193, 204-206
- Consent. *See* Positivists
- Consolato del Mare*, 848, 890
- Constitutions
relation to international law, 40-43
- Constitution of U. S. and treaties, 41, 467
and private international law, 222
and interstate rendition, 501

Consuls

- distinguished from diplomatic agents, 410, 435-436, 428-435
- exequatur, 436, 438-439
- functions, 435-444
- immunities, 436, 438-440, 445-451
- importance, 435
- jurisdiction over ships, 282-286, 441-443
- and League sanctions, 665
- in nonrecognized States, 116
- origin of, 280-281
- treaty status, 436, 438-444

Consultation, 600-601

Continuous voyage. *See* Ulterior destinationContraband. *See also* Arms, ammunition, and implements of war

- absolute, 25-29, 897-900, 903-904
- conditional, 25-29, 900-902, 904, 933-940
- Declaration of London on, 897-905, 936
- Declaration of Paris on, 26, 890-892
- distinguished from blockade, 910-920
- enemy destination, 819, 820, 903-904, 928, 931-940
- in European War of 1939, 897-898
- in World War, 891, 894-895, 899-903
- knowledge of, 905
- on *Lusitania*, 824-825, 829-830
- non-contraband, 902-903
- penalties for carriage, 904-905
- U. S. Navy instructions on, 819-820

Contract debts

- state responsibility for, 353, 379-391
- succession to, 38-39, 329-336
- use of force in collection of (Hague Convention), 661-662

Convention for Maintenance, etc., of Peace, 600

Convention of Inter-American Conciliation, 596

Conventions. *See* Treaties

Conversion of merchant ships, 813, 814

- converted ships in neutral waters, 876, 994

Convoy, 817-818, 909

Cook v. U. S., 227

Corbett, P. E., 52

Corfu Incident, 653-654

Corwin, E. S., 706

Cuba as sovereign State under Convention of 1903, 64, 65

Cummings v. Deutsche Bank, 731*Cunard S. S. Co. v. Mellon*, 227

Cushing Treaty, 281

Customs areas, 228

Customs union and independence of Austria, 49

Cybichowski, 766

Czechoslovakia

- annexation by Germany, 654-655
- minorities treaty, 60-63, 65
- recognition, 693
- status of at dissolution, 72-73

Dainese v. Hale, 281

Danzig, Free City of, 73-74

Days of grace, 732, 733-734

Deák, F., 427, 891

Declaration of London. Text, 892-912; 9, 828

Declaration of Paris. Text, 890-892; 8, 26-28

Declaration of St. Petersburg, 9, 788

Deere, L., 539

De facto governments, 126-129, 326. *See also* Recognition*De jure* governments. *See* RecognitionDenial of justice. *See* Responsibility of States

Denmark-Iceland Act of Union, 59

Dennis, W. C., 230

Dependent communities, 47-50, 66-76

Destination, enemy. *See* Contraband

Destruction of vessels

- by aircraft, 798-799
- by submarines, 822-836
- enemy merchant ships, 824-827, 832, 835-836
- neutral prizes, 906-907

Dexter and Carpenter v. Kunglig Jarnvagstyrelsen, 266-267

Dickinson, E. D., 131, 139, 266

- on jurisdiction with respect to crime, 215-216

Diplomatic agents

- agrégation*, 405
- distinguished from consuls, 410, 428-435
- duty to protect nationals, 419-420
- functions, 405, 406, 409-410, 414-415
- immunities, 406-407, 408, 415-418, 421-422; 423-426, 426-428 (cases on, not indexed), 428-435
- rank, 404, 410, 411
- right of legation, 404
- termination of mission, 408-409, 414; as sanction, 665

- Discovery and occupation, 193-203
 Display of force, 623, 638
 Dithmar and Boldt, Case of, 841-842
 Doelitzsch, *In re*, 494
 Domestic jurisdiction, 146-152
Domini v. Kenk, 718
Dougherty v. Equitable Life Assurance Co., 133
 Drago doctrine, 662
 Due diligence
 and injuries to aliens, 353
 of neutrals, 863-868, 873
Duff Development Co. v. Kelantan, 66-72, 74
 Dulles, A. W., 856, 974
 Dumbauld, E., 971
 Dum-dum bullets, 768-769
 Duress. *See* Treaties
- Eagleton, C., 355, 700
 on Geneva Protocol, 584
 Eckermann, Case of, 538
 "Eclectics" or Grotians, 7
 Egypt, 281
Eliza Ann, The, 476, 701
 Embargo
 on arms, munitions. *See* Arms, ammunition, implements of war
 as League sanction, 676-680
 as redress short of war, 623, 627-629
Emperor of Austria v. Day, 122
 Enemy aliens
 property of, 725-732
 rights of suit, 718-725
 Enemy character of vessels, 908
 Enemy property
 enemy merchant ships, 732-734
 in occupied territory, 763
 property of enemy aliens, 725-732
 Enlistments in belligerent forces
 obligation of neutral to prevent, 868-869
 prohibited on U. S. territory, 858
 U. S. experience in World War, 963
 Equality of States, 18, 48-49
 Equity, 75-76
 Erosion, 206-208, 242
 Espionage
 by aircraft, 792
 Espionage Act, 958
 by radio, 785
 spies, 764
Ester, The, 286
Établissement Coullerez v. Maison Stein, 718
 Ethiopia
 League sanctions, 674-684
 Recognition of as Italian Empire, 103
 spheres of influence in, 83-87
 U. S. "neutral policy," 971, 973-975, 981
 European War of 1939
 contraband lists, 897-898
 U. S. policy, 857, 859-862, 971, 981-1000
Ex aequo et bono, 24
 Exception of public order, 131-134, 222
 Executive agreements, 468
 Exhaustion of local remedies. *See* Responsibility of States
 Expatriation. *See* Nationality
 Explosive shells, 9
 Exports from neutral territory. *See also* Arms, ammunition, implements of war; Contraband; Neutral territory as base of military operations
 aircraft, 795
 in general, 869, 873
 Extradition
 basis of, 494-495, 496, 502, 504, 508
 double criminality, 498-499, 504, 509-534, 541
 extraditable offenses (U. S.-Great Britain), 496-498
 interstate rendition, 501
 of nationals, 479-482, 507-509
 political offenses, 498, 534-540, 543
 procedure, 498-506
 strict treaty construction, 498, 507
 treaties, 494-495, 496-501 (text), 502, 511
 Extraterritoriality, 280-281
- Faber Case, 279
Factor v. Laubenheimer. Text, 509-519; 467, 531-534
 Fairman, C., 460
 Falck, *In re*, 768
 Falcke, H. P., 639
 Federal States, 47, 59-60
 Feilchenfeld, E., 327, 336, 344
 Feller, A. H., 355, 409
 Fenwick, C. G., 96, 856
 Ferdinand, *In re*. Text, 725-730
 Finland, 66
 Fitzmaurice, G. G., 230

- Flack, F. W., Case of, 355
- Flags
 and enemy character, 908
 false, in submarine warfare, 823, 961;
 closure of U. S. ports to ships of States
 permitting, 961, 996-997
 of truce, 763, 765
- Fleming and Marshall v. Page*. Text, 204-206
- Flournoy, R. W., Jr., 154, 156, 166, 181
- Flutie Cases, 177, 178
- Force, use of
 and Geneva Protocol, 590-591
 and Kellogg Pact, 549-550
 and League Covenant ("resort to war"),
 565, 663, 666
 as ground for avoiding treaties, 464-465
 as redress without war, 623-684
 relation to legal war, 663, 666, 693-709
- Forced participation in military operations, 763
- Foster v. Neilson*, 41-42
- Fraudulent papers, 819
- Fred S. James and Co. v. Second Russian
 Reinsurance Co.*, 130-131
- Free ships, free goods. *See* Contraband
- Freedom of the seas, 812
- French Republic v. Board of Supervisors*, 267
- Fundamental rights of States, 14-19, 48-49.
 See also Naturalists
- Garner, J. W., 266, 337, 751, 753, 812, 841
 on: days of grace, 733
 enemy property, 754
 expanding bullets, 768-769
 extradition of nationals, 508
 forbidden weapons, poison, 762
 gases, 769-770
 guides, military work, 763
 Hartlepool Incident, 809
 list of wars, 691-693
 occupied areas, 766-768
 postal correspondence, 821
 prisoners, 757
 Red Cross Convention, 773
 trading with enemy, 745
 undefended towns, 764
- Gases in war
 as poison, 762
 Protocol, text and various conventions, 769-
 771
 and nonrecognized States, 114
- General Act of Arbitration, abstract, 593-594;
 193-194, 546, 602-608
- General Claims Commission, U. S.-Mexico,
 139, 357
 on "Calvo clause," 369-379
 on denial of justice, 358-368
- General Pact for the Renunciation of War.
 See Kellogg Pact
- General Treaty of Inter-American Arbitration,
 599-600, 602-608
- Geneva Protocol. Text, 584-593; 547-548
- Germany
 and Austrian debts, 336-337
 as federal union, 59
 relation to Bohemia and Moravia, 72-73,
 104
- Gettys, L., 166
- Gillam v. U. S.*, 229
- Giraud, M., 639
- "Gold Clause" Loans, 379-391
- "Gondra" Treaty, 596, 603-609
- Good offices, 545-546, 551, 600
- Grace and Ruby*, The, 227
- Graham, M. W., 96
- Gray v. U. S.* Text, 630-637; 702
- Great Britain
 and Hanover as personal union, 59
 Nationality and Status of Aliens Act, 180
 status of, and Dominions, 52-56
- Greece
 Bulgarian dispute, 654
 minorities treaty, 63
- Greytown Incident, 653
- Griswold, A. W., 979
- Grotius, 6-7, 753, 849
- Guides, 763
- Hackworth, G. H., 355
- Hague Conference for Codification of Inter-
 national Law
 Conflict of nationality laws. Text, 183-186;
 166, 177, 182
 Military obligations, dual nationality. Text,
 178-179
 Protocols on statelessness, 174-175
 Report to committee of experts, extradition,
 508-509
 Responsibility of States, 351-354
 Territorial sea. Text, 222-227

- Hague Conventions and Declarations. *See also*
 Table of documents reprinted, and special subjects
 in general, 9, 851-853
 and nonrecognized States, 112-114
- Haile Selassie v. Cable and Wireless Co.*, 122
- Haiti
 statehood, 49, 64, 65
 Treaty of 1915, 647-650
 U. S. intervention, 640-652
- Hartlepool Incident, 809
- Harvard Draft Conventions, Comment
 competence of courts with regard to foreign States, 269
 consuls, 435-438
 exhaustion of local remedies (comment), 358
 extradition, 494, 495, 532-533, 537-539
 jurisdiction with respect to crime. Text, 214-221
 nationality, 153-154, 165-166, 181
 neutral States in naval and aerial war, 847
 piracy, 300
 responsibility of States. Text, 351-355
 treaties, 459-463, 470, 476-477, 717-718
- Haver v. Yaker*. Text, 474-476; 461
- Hawaiian Claims, 338
- Head Money Cases, 468
- Hershey, A. S., 662
- Hilton v. Guyot*, 221, 222
- Hindmarsh, A. E., 638, 639, 653
- Hogan, A. E., 639
- Hornspohn John v. Bey of Tunis*, 268
- Hospital ships, 836-842
- Hostages, 753
- Hostilities
 conduct of, in the air, 781-799; on land (Hague Convention), 751-781; at sea (including Hague Convention), 808-842; value of these rules, 751-754
 opening of, 693-704; and Hague Convention, 699-703
- "Hot pursuit," 226, 229-230
- Hovering, 227-229
- Hudson, M. O., 49, 53, 65, 66, 73, 154, 156, 181, 266, 280, 355, 357, 538, 570, 705, 725, 770, 842, 976
 on: double criminality in extradition, 533
 Hague nationality conventions, 182
 international legislation, 484-487
 unions of States, 58-59
- Hungary, 63
- Hurst, C. J. B., 338, 718
- Hyde, C. C., 66, 230, 533, 539
- Iceland. *See* Denmark-Iceland
- Iloilo Claims, 476
- I'm Alone*, The, 229-230, 468
- Immunity of state agencies engaged in trade, 265, 266-269
- Imperial Conference of 1926, 52-55
- Import boycott, 678-679
- Independence of States, 47-87
- Indian tribes, 74-76
- Innocent passage
 aircraft, 301
 ships, 224-227
- Institute of International Law, 94, 96-97
- Instructions for the Government of the Armies of the United States in the Field. *See* Lieber's Code
- Instructions to Diplomatic Officers of U. S., 409-420
- Insull Case. Text, 519-530; 530-533
- Insurgency, 137-139, 953-955
- Inter-American Treaty on Good Offices and Mediation, 600
- International Labor Organization, 469-470
- International law
 definition, 3
 history, 6-11
 relation to national law, 33-43
 sources, 24-33
 subjects of, 47-50
 theories of obligation, 11-19
- International legislation, 3, 7-11
 Hudson on, 484-487
- International unions, 4, 9, 115
 Hudson on (*q.v.* for particular unions), 485-487
- International Commission for Air Navigation. Text, 305-307
 and League Covenant, 569
- Internment
 of aircraft, 795-796
 of belligerent troops, 869-870
 of belligerent warships, 877
 proposed, of belligerent merchant ships by U. S., 961
- Interstate rendition, 501

- Intervention, 19. *See also* Force, use of;
 Armed intervention without war
 Inviolability of neutral territory and aircraft,
 795
 in land warfare, 868
 in naval war, 871-872
Irish Free State v. Guaranty Co., 328
 Island of Palmas Case. Text, 193-202
 Italy
 sanctions against, 627, 662-663, 674-684
 sphere of influence in Ethiopia, 83-87
 state continuity in, 326
Itata, The, 229
- Jaffe, L., 123, 131
 Japan and Manchukuo, 106-110, 655-661
 Jefferson, T., 99
 Jessup, P. C., 133, 286
 on neutrality, 847-854, 856
 Johnson Act, 975
 Johnson Case (U. S.-Peru), 358
 Joint control of foreign policy, 56-58
 Judicial rights, suspension of in war, 720-721,
 763
 Judicial settlement, 548, 563-564, 570-584
 Geneva Protocol, 586. *See also* Permanent
 Court of International Justice
 Jurisdiction of territorial sovereigns, various
 principles of, 215-216
 airspace, 217-218, 300-307, 786-787
 over aliens, 19, 219-220. *See also* Responsi-
 bility of States
 bays, 230-238
 boundary rivers, 237-245
 canals, 269-277
 over crime, 215-221; counterfeiting and
 crimes against State security, 218
 diplomatic agents (*q.v.*) 247-248
 exceptions by treaty, 269-277
 extraterritoriality, 280-281
 foreign ships, 224-227, 245-277
 foreign state ships in trade, 262-267
 foreign sovereigns, 247
 foreign troops, 248-249
 international rivers, 278-280
 over nationals, 19, 218-219
 national ships, 217-218, 282-289
 over pirates, 4, 218, 290-300
 servitudes, 273-274, 277-278
- Jurisdiction of territorial sovereigns—*Cont.*
 territorial sea, 222-227, 252
 hovering, hot pursuit, 227-230
 over territory, 19, 212-215, 217, 219, 246-
 247
Jus sanguinis. *See* Nationality
Jus soli. *See* Nationality
- Karnuth v. U. S.*, 718
 Keeton, G. W., 281
 Kelantan, 66-72
 Kellogg Arbitration Treaties. Text, 598; 599
 Kellogg Conciliation Treaties. Text, 594-595;
 596
 Kellogg Pact. Text, 548-550; 10
 declarations of war and, 701
 in Anti-War Treaty of Non-Aggression,
 596-597
 interpretation, 549-550
 nonrecognized States and, 113-114
 self-defense and, 658-659
Kentucky v. Dennison, 501
Kershaw v. Kelsey. Text, 734-737
Kim, The. Text, 931-940
King v. The Earl of Crewe, 72
King of Prussia v. Kuepper's Administrator,
 122
 Koster, J., 718
Kotzias v. Tyser, 476
 Kuhn, A. K., 222
- Lage, W. P., 823, 831, 857
 Lansing-Ishii Agreement, 468
 Lauterpacht, H. *See also* Oppenheim, L.
 methods of pacific settlement, 545-547
 Law Officers of the Crown, Opinions
 belligerency, 134-137
 liability of parent State for debts of revo-
 lutionaries, 331-335
 Lawrence, T. J. ("Winfield's Lawrence")
 belligerency, 134-135
 privateers, 813-814
 League of Nations, 10, 13-14, 49
 Covenant, text of, 558-570
 amendments, 570; Geneva Protocol as
 proposed amendments, 585-593
 Articles 11, 15 as good offices, mediation,
 546
 Ethiopia and, 83, 661-684
 Manchukuo and, 109-117
 mandates, 82-83

- League of Nations—*Cont.*
 membership, 50-52
 person in international law, 53
 sanctions, 661-664
 treaties, reconsideration of, 483-484
 registration of, 460
 U. S., co-operation of, 107-110, 973-975,
 979
 and use of force, Corfu, Bulgaria, 653-654
 League of Nations procedure of pacific settle-
 ment
 Covenant, 563-566
 Geneva Protocol, 587-588
Lehigh Valley R. R. Co. v. State of Russia,
 123
Leonora, The. Text, 941-949
Levy en masse, 756-757
 Lewis, J. H., Case of, 229
 Lieber's Code, 8-9
 guides, 763; quarter, 762-763
 Liquor treaties, 227-228, 229-230
 Little Entente, 49, 55-58, 59
 Little Entente Pact, 56-58
Littlejohn v. U. S., 733
 Litvinoff, M., 104-107
 Lizardi Case, 178
Llandoverly Castle, The, 841-842
 Loans or credits
 by neutrals to belligerents, 872-873; War-
 ren proposals, 962-963; U. S. neutral
 policy, 975, 978, 980, 984, 991-992
 "gold clause" loans, 379-391
 Johnson Act, 975
 prohibition of, as League sanctions, 677-
 678
 Lobingier, C. S., 280
 Lorenzen, E. G., 222
 Louisiana, acquisition of, 208-211
Lusitania, The, 822-831
Luther v. Sagor and Co. Text, 123-130; 131
 Luxemburg, 66
 Lytton Report, 108

 Mackenzie Case, 177
McVeigh v. U. S., 721-723
Magdalena Steam Navigation Co. v. Martin.
 Text, 423-426
 Manchukuo
 "independence movement" in, 107-108
 nonrecognition of, 95, 104, 107-109, 979

 Mandates, 4
 list of, text of Covenant, 567-569
 Mandate for Palestine, text, 76-83
Manouba, The. Text, 949-953.
 Maritime neutrality, Havana Convention on,
 836, 854, 869, 871, 872-876
 Martens, G. F. von, 7
Mason v. Intercolonial Railway, 266
 Masters, R. D., 40-43
 Mathews, J. M., 706
Matsuyama and Sano v. Republic of China,
 267
 Maurice, J. F., 700
 Mediation, 545-546, 551, 600
 Medina Case, 178
 Members of community of nations, 47-87
 Merchant ships. *See also* Jurisdiction
 belligerent, in U. S. ports, 961. *See also*
 Armed merchantmen; Neutral territory
 as base of military operations
 conversion into warships (and Hague Con-
 vention), 813, 814; as auxiliary warships,
 813-815, 961
 enemy, at outbreak of hostilities (and Hague
 Convention), 732-733
 foreign, 251-252
 in ports, 282-286
 in territorial sea, 225-226
 national, in foreign waters, 286-289
 Meunier, *In re*, 539
 Mexico
 as federal union, 59
 recognition of governments of, 95, 99-100,
 102
 responsibility toward foreigners, 359-378
Mighell v. Sultan of Johore, 122, 267
 Military service. *See* Nationality
 Miller, Hunter, 208, 470
 Mines, submarine, 810-812, 828
 Minorities, 4, 48, 49, 63
 German settlers in Poland, 338-343
 Treaty with Czechoslovakia, text, 60-63
 Mirkine-Guetzévitch, 41
 Mob violence. *See* Responsibility of States
 Mobilization, 638
 Monaco, 65
 Monroe Doctrine, 8
 and League Covenant, 567
 and U. S. "Neutrality Acts," 976, 979,
 993

- Montevideo Convention. *See* Rights and duties of States
- Montreaux Convention, 281
- Moore, J. B., 102, 166, 335, 355, 358, 539, 718, 732
 on: combatants, 756
 confiscation of enemy property, 754
 extradition, 494, 501
 legal and material war, 700
 neutrality, 854, 857
 protection of nationals by U. S., 173, 176
 recognition of U. S. S. R., 107
- Morgenthau, H. J., 66
- Morrow, I. F. D., 74
- Mortensen v. Peters*. Text, 33-35
- Most-favored-nation treaties, 469-474
- Myers, D. P., 570
- National Munitions Control Board, 972, 979, 985, 994-996
- Nationality, definitions, 153-154
 of aircraft, 301-302, 786
 of children, 154-157, 160, 185
 Convention on Conflict of Nationality Laws.
 Text, 182-184; 153, 166, 177
 dual and multiple, 175-179
 expatriation, 165-166, 184
 Harvard Draft Convention, 153
 international claims and, 175-177, 354-356
 jus sanguinis, 153-156, 156-157, 160
 jus soli, 153-156
 military service and, 175-179
 of minorities, Czechoslovakia, 60-61
 naturalization, 154, 157-164
 nature of nationality questions, 146-152, 153
 of ships, 908
 statelessness, 166-175
- Nature, law of, 7, 14-19, 48-49
- Naulilaa Claim, 625-626
- Navemar*, The, 265
- Navigable Waterways, Statute on. Text, 279-280
- Negotiation, 545
- Nereide*, The, 814
- Netherlands, 59
- Neutral mail vessels, 818
- Neutral persons, 870
- Neutral territory as base of belligerent operations
 aircraft, 795-796
 enlistments, 858, 868-869, 963
 fitting out and arming vessels, 859-860, 863-868, 873
 naval operations, 872
 radio, 783-785, 861, 958-959
 supply ships, 961-962, 972, 975, 993-994
- Neutrality, history and nature, 847-857
 acts forbidden to inhabitants of neutral State, 857-863. *See also* Neutral territory, as base of belligerent operations
 in aerial war, 792-799
 in Anti-War Treaty, 597
 and civil wars, 134-139, 953-955, 976-978
 Declaration of London, 892-911
 Declaration of Paris, 890-892
 "fallacies" of, 998-1000
 Hague Conventions, 868-877
 and international canals, 269-277
 policies of U. S., 970-1000. *See also* "Neutrality Acts," U. S.
 radio and, 781-785
 traditional, 857-952
 in war on land, 851-852, 868-871; in naval war, 852-853, 871-877. *See also* Blockade; Contraband; Unneutral service; Prize; etc.
 Warren proposals, 955-970
- "Neutrality Acts," U. S.
 of 1935, 971-972; of 1936, 975-976; of 1937, 978-979; of 1939, text, 986-998, 981-982, 984-985
- Neutralized States, 65-66
- Nonintercourse, 623, 624-625, 627
 as League sanction, 661-683
- Nonintervention, 19, 562, 977-978
- Nonrecognition, 19
 effects of in courts, 117-134
 Manchukuo, 95, 107-110; effects of, 111-117
- Occupied territory, authority over
 contributions, 766, 777
 forbidden acts, 766-768
 Hague Convention, 766-768
 penalties, 767
 private property and rights, 766, 767
 requisitions, 767

- Occupied territory—*Cont.*
 state property, 767, 768
 submarine cables, 767-768
 taxes, 766
 U. S. forces, 204-206
 when occupied, 766
- Oetjen v. Central Leather Co.*, 132
- Officers, acts of. *See* Responsibility of States
- Offut, M., 652-653
- Ogilvie, P. M., 279
- O'Neill v. Central Leather Co.*, 132
- Oppenheim, L. ("Lauterpacht's Oppenheim"),
 462, 812, 841
 on: combatants, 756
 enemy ships, outbreak of hostilities, 734
 forbidden weapons, treachery, 762
 occupied areas, 766-768
 pacific settlement, 545-548
 prisoners, 757
 projectiles from balloons, 771-772
 ruses of war, 763-764
 trade with enemy, 745-746
 undefended towns, 764
- "Optional clause." Text, 579-580; ratifications,
 602-608
 in Geneva Protocol, 585-586
- Oriental Navigation Co. Case, 139
- O'Rourke, V. A., 704
- Ottlik, G., 280
- Pacific blockade, 623, 638-639
 as League sanction, 665, 672-674
 Sino-Japanese conflict, 980-981
 Venezuelan preferential claims, 638-639
- Pacific settlement of international disputes,
 545-609. *See also* Negotiation, Consulta-
 tion, Good offices, Mediation, Concilia-
 tion, Commissions of inquiry, Arbitration,
 Judicial settlement, League of Nations
 procedure, etc.
 definitions of methods, 545-548
 obligation of (Kellogg Pact), 548-550;
 (League Members), 564
 and U. S., 548-551, 594-609
- Pacta sunt servanda*. *See* Treaties
- Padelford, N. J., 638, 704
- Palos Incident*, 637-638
- Panama, as sovereign State under Treaty of
 1903, 65
- Pan-American Congresses, 9-10
- Paper blockades, 850-851, 890, 912
- Paquete Habana*, The, 29-33, 821
- Paranouk v. Turkey*, 71
- Partial war, 630-637
- Passports, 115-116, 175-176
- Pavelitch and Kvaternik, Case of, 538
- Peace of the port, 282-286
- Peace, Convention for Maintenance, etc., 600
- Pedro*, The, 702
- Perfidy, 763-764, 791
- Permanent Court of Arbitration
 Awards, 177, 193-203, 638-639, 928-931,
 949-953
 Hague Convention (I), 554-558
 in Root and Kellogg Treaties, 599
- Permanent Court of International Justice
 Statute, text, 570-584; sources of law ap-
 plied, 24-25
 Judgments (texts): 269-277, 379-391
 Advisory Opinions, Statute on, 583-584;
 texts, 146-152, 338-343
 in Geneva Protocol, 585-586
 on independence, 48-49
 and judicial settlement, 548
 nationality questions, 146-152
 neutrality of Kiel Canal, 269-277
 and nonrecognized States, 114
 Polish minorities treaty, 63
rebus sic stantibus, 463
 Serbian loans, 379-391
 unregistered treaties, 460
- Perrin v. U. S.*, 653
- Peterhoff*, The, 911-920
- Petrogradsky Bank v. National City Bank*,
 132
- Philippine Islands, 66
- Phillimore, Sir Robert, 331-335
- Phillipson, C., 706
- Pillage, 763-764, 766, 810
- Piracy *jure gentium*, *In re*, 290-300
- Pirates, 4, 218, 290-300, 637-638, 955
- Poison, 762, 769-771
- Poland, 49, 63
- Politis, N., 718
- Porter v. Freudenberg*. Text, 718-724; 725,
 763
- Positivists, 7, 15-17
- Posselt v. d'Espard*, 725
- Postal correspondence exempt from naval cap-
 ture, 821

- Prescription, 201, 203-204
- Princess Thurn and Taxis v. Muffit*, 725
- Prisoners of war, conventions on, 757-761
(texts)
conventions and nonrecognized States, 112, 114
- Private international law
and recognition, 131-133
execution of foreign judgments, 221-222
- Privateers, 813-814; Declaration of Paris, 890-892
- Prize. *See also* Captures
aircraft as, 798
captures forbidden in neutral jurisdictions, 862, 872
courts, 862, 872, 884-890, 943
international prize court, 9, 892-893
in neutral waters, 876, 877-884, 961
- Prize Cases*, *The*. Text, 693-699; 702, 703
- Prometheus*, *The*. Text, 25-29
- Proportionality, principle of, 624-626
- Protection of nationals. *See also* Responsibility of States
duty of protection, 419-420
in nonrecognized States, 115
- Protector*, *The*, 703
- Protectorates, 48, 49, 71-73; nationality in, 146-152
- Protocol for Pacific Settlement of International Disputes. Text, 584-593
- Protocol of Inter-American Conciliation, 596
- Protocol of London, 1871, 461
- Quarter, 762
- Radio, use in war, 10, 781-785; belligerent, in neutral jurisdiction, 868, 869, 872, 958-959
- Railway materials, requisition of, 870
- Ralston, J. H., 355, 357
- Rau v. Duruy*, 269
- Rauscher, *In re*, 494, 507
- Rebus sic stantibus*, 150-151; (treaties) 462-463
- Reciprocal trade agreements, 468
- Recognition. *See also* Nonrecognition
acts constituting, 95-96
of belligerents, 94, 134-137, 693-699
de jure and *de facto*, 96-98, 112, 114, 693
effect of on right to sue, 117-123
- Recognition—*Cont.*
effect of on validity of acts, 123-134
importance of, 94-95
of insurgents, 94, 137-139
of new States and Governments, 18, 94, 98, 693
as policy, 97-98, 103-104; of U. S., 98-103
revocability of, 97
- Red Cross Conventions
Convention of 1929 (text), 773-781
Hague Convention (X) (text), 836-840; 840-842; 112-113, 870
- Redress short of war, 623-684
- Reeves, J. S., on territorial sea, 223-224
- Refugees, 357
- Regina v. Anderson*. Text, 286-289
- Reid, H. D., on servitudes, international rivers, 278-279
- Reiff, H., 467
- Reprisals, 623, 624-625, 630-638, 752-753.
See also Retaliation
- Requisitions
enforceable by naval bombardment, 809
of neutral railway materials, 870
in occupied territory, 767
- Resort to war. *See also* Kellogg Pact; War Geneva Protocol, 585, 589, 592
League Covenant, 563-566, 663, 666, 700-702
- Responsibility of States, general principles, 351-358
acts of officers, 352, 361-363, 394; 444-451
acts of revolutionaries, 354
contracts, 353, 369-391
denial of justice, 353, 358-368
due diligence, 353
duty to maintain adequate governmental organization, 352
exhaustion of local remedies, 352, 357-358, 359
mob violence, 353, 358-368
nationality of claims, 175-177, 354-356
waiver of liability, 354
- Retaliation, 941-949, 965
- Retorsion, 623, 624-625
- Revolutionaries, 4, 354. *See also* Belligerency; Insurgency
- Rights and Duties of States, Montevideo Convention on. Text, 17-19; 47, 357

- Rivers, as boundaries, 237-244; international, 277-280
- Rogdai*, The, 123
- Ronan, W. J., on existence of legal war, 702-703
- Roosevelt, F. D.
Neutrality Proclamations, 857-862, 973-974, 982-984, 986, 990, 994
recognition of U. S. S. R., 104-107
- Root Treaties, 595-596, 599-601, 602-608
- Ross, *In re*, 280-281
- Roumania, 63
- R. v. F. S. R. v. Cibrario*. Text, 117-122
- Ruden Case, 358
- Rüchland, 718
- Rule of War of 1756, 848-849
- Rumanian Bank of Commerce v. Poland*, 268
- Rumanian State v. Pascalet and Co.*, 268, 269
- Ruses of war, 763-764
- Russia. *See* U. S. S. R.
- Russian Reinsurance Co. v. Stoddard*, 132
- Sack, A. N., 327
- Salem Case, 178
- Salinoff and Co. v. Standard Oil Co.*, 132-133
- Sally*, The, and *The Newton*, 285-286
- Sanctions
Assembly Resolutions, 663-665
in Geneva Protocol, 590-592
League Covenant, 555-556, 624, 627
Report of Secretary-General, 665-674
and third States, 670-674
U. S. and, 683, 973-975
use against Italy, 627, 662-663, 674-684
- Sandifer, D. V., 156
- Sanitary formations, 775-778
- Sapphire*, The. Text, 318-320
- Savage, C., 812, 821
- Sayre, F. B., 470
- Schaffenius v. Goldberg*, 725
- Schmidlin v. Société des Nations*, 52
- Schooner Exchange v. M'Faddon*. Text, 245-254; 122, 256, 263, 264, 267
- Scott, J. B., 60, 237, 639, 661-662, 754, 768, 808, 810
- Scott, J. B., and Jaeger, W. H. E., 60
- Seckler-Hudson, C., on statelessness, 173-174, 181
- Self-defense
Japanese argument concerning Manchukuo, 655-661
and Kellogg Pact, 658-659
Webster on, 660
- Serbian Loans Case. Text, 379-391; 355
- Servitudes, in general, 277-280; over Kiel Canal, 272-273, 277-278
- Severance of diplomatic relations, 623, 626-627, 665
- Ship North v. The King*, 229
- Sick and wounded. *See* Red Cross Conventions
- Sino-Japanese conflict
nonrecognition in, 107-118
self-defense in, 655-661
U. S. policy, 971, 979-981
- Slovakia, as "protectorate," 72, 73
- Smith, H. A., 135, 136, 137, 331
- Society for Propagation of the Gospel v. New Haven*, 718
- Šokoloff v. National City Bank*, 132
- South African Republic v. La Compagnie Franco Belge du Nord*, 122
- Sovereign, sovereignty, 47-87
- Spanish Civil War
belligerency and, 704
insurgency and, 138, 139
lack of declaration in, 700
U. S. policy, 971, 976-978
- Spencer, J. H., 702, 769, 773, 785
- Spheres of influence, 83-87
- Spies, 764. *See also* Espionage
- State continuity
change in government, 318-320
change in territory, 326-327
under *de facto* governments, 326
and treaties, 320-325, 461
- State-owned trading vessels, immunity of, 262-266; Brussels Convention on, 265-266
- State succession
annexation, 326, 335-337
change in form of government, 318-320
to contracts, 329-336
to debts, 328-337; local debts, 331; Germany and Austrian debt, 336-337
de facto governments, 326
federation, 320-326
to liability for torts, 36-40, 337-338
partition, 328-331

- State succession—*Cont.*
 persistence of local law, private rights, 338-344
 to state property, 328
 to treaties, 320-325, 327-328
 unsuccessful revolt, 331-335
 Statelessness. *See* Nationality
 States as persons of international law, 18, 47-87
Statham v. Statham and the Gaekwar of Baroda, 74
 Statute of Anne, 421, 425
 Statute on Regime of Navigable Waterways of International Concern, 279-280
 Stern, W. B., 83
Stetson v. U. S., 230-238
Stigstad, The, 942-944
 Stimson, H. L., on nonrecognition, 110; on U. S. recognition policy, 98-103
 Stockholm Rules of Neutrality, 871, 872-876
Stoeck v. Public Trustee. Text, 166-172
 Stowell, E. C., on reprisals, 637; on severance of diplomatic relations, 626-627
 Submarines
 and armed merchant vessels, 815
Lusitania correspondence, 822-831
 in neutral waters, 874
 proposed *modus vivendi* (1916), 831-833
 rules of 1936, 834-835, 836
 in territorial sea, 227
 in U. S. waters, 960, 972, 979, 985, 994
Sutherland v. Mayer. Text, 737-746
 Suzerain, suzerainty, 71, 74
 Switzerland, 59, 65-66

Techt v. Hughes. Text, 710-718; 482
Terlinden v. Ames. Text, 320-326; 326-327
 Territorial sea, 33-35, 222-230
 Territory
 acquisition of, 193-211
 inviolability of, 19, 562
 relation to jurisdiction, 212-222
 relation to law, 212-215
 Terrorism, Convention on, 539-540
 Texas Bonds, Case of, 335
Texas v. White, 131-132
 Thalweg, 239-245
Three Friends, The, 138
 Three-mile limit. *See* Territorial sea
 Tinoco Arbitration, 326
 Tobin, 718
 Trade with the enemy, 734-746, 820
 Transfer of flag, 907-908
 Travel on belligerent vessels, 960, 972, 973, 979, 983-984, 985, 990-991. *See also Lusitania*
 Treacherous killing or wounding, 762
 Treaties (international agreements), in general (Havana Convention), 459-464
 when binding internationally and internally, 461, 466-477, 516-517
 duress, 464-465
 Harvard Draft Convention, 459-463
 as international legislation, 484-487
 interpretation, 460, 477-479, 513-514
 nonrecognized States and, 112-114
pacta sunt servanda, 461
 procedure for conclusion and ratification, 459-460; in U. S., 467-470
rebus sic stantibus, 462-463
 reconsideration of, 483-484
 registration with League, 460
 relation to national law, 40-42, 470-477
 reservations, 460-461
 termination, 320-326, 462-463, 479-481, 530
 Treaties of U. S. *See also* Table of Documents
 Reprinted at Length
 with Greece (extradition), 521, 530-531
 with Norway (military service), 178
 Treaty of Washington, Rules of. Text, 863; 851
Triquet v. Bath, 421
 Turkey, 63, 326-327
 Turlington, E., 732

 Ulterior destination
 and blockade, 897, 911-917
 and absolute contraband, 903, 917-919, 928, 931-940
 and conditional contraband, 904, 917-918, 928, 931-940
Underhill v. Hernandez, 132
 Unions of States, 58-60
 United States of America
 as federal union, 59
 intervention in Haiti, 640-652
 and neutrality, 955-1000
 and nonrecognition of Manchukuo, 108, 110

- United States of America—*Cont.*
 and pacific settlement, 594-609
 recognition policy of, 97-103
 and submarine warfare, 822-834
 U. S. Constitution. *See* Constitutions
 U. S. Statutes, Instructions, Regulations. *See*
 Table of Documents Reprinted at Length
U. S. (Tellech) v. Austria and Hungary. Text,
 175-176; 177
U. S. v. Belmont, 133
U. S. v. Bengochea, 227
U. S. v. Cook, 474
U. S. v. Deutsches Kalisyndikat Gesellschaft,
 265, 267-268
U. S. v. Flores, 289
U. S. v. McRae, 328
U. S. (Chattin) v. Mexico. Text, 358-368; 356
U. S. (North American Dredging Co.) v.
Mexico. Text, 369-378, 356, 358
U. S. v. Pelly, 702
U. S. v. Prioleau, 328
U. S. v. Sisal Sales Corporation, 215
U. S. v. Wong Kim Ark, 155
 Unnecessary suffering, 763, 771
 Unneutral service
 and aircraft, 797, 798
 definition of, Declaration of London, 905-
 906
 and liability to capture, 819, 949-952
Usparicha v. Noble, 745
 U. S. S. R. as federal union, 59; U. S. recog-
 nition of, 103, 104-107
U. S. S. R. v. Compagnie Ropit, 131

Valentine v. U. S. ex rel. Neidecker, 482,
 508
Vattel, 7; on equality of States, 48; 477
Vavasseur v. Krupp, 267
 Venezuela as federal union, 59; Preferential
 Claims, 638-639
Vilas v. City of Manila, 344
 Visit and search
 by aircraft, 796-799
 limitations on, 817-818
 method of exercise, 816
 in neutral waters, 862
 resistance to, 909
 when and where exercised, 815-816
Visscher, C. de, 509

Vladikavkazsky Ry. Co. v. N. Y. Trust Co.,
 133
 War: effect on normal relations
 on enemy merchant ships, 732-734
 on property of enemy aliens, 725-731
 on status of enemy aliens in courts, 718-725
 on treaties, 710-718
 trade with the enemy, 734-746
 War: legal status
 as bilateral relation, 691-693
 civil war, 693-699, 703-704
 commencement of, 691-704
 declarations of, 695, 699-704
 and Kellogg Pact, 548-550
 and League Covenant, 663, 666-669
 legal and material war, 699-703, 705
 list of wars commencing 1914-1918, 691-
 693
 termination of, 704-706
 War, rules of conduct of. *See* Hostilities
 War, totalitarian, 753-754, 763
 Warren, C., "Troubles of a Neutral," 955-
 970
 Warships
 belligerent, in neutral waters, 874-877
 conversion of merchant ships, 813, 814
 jurisdiction over foreign, 245-254
 merchantmen as auxiliaries, 813-815, 961.
See also Armed merchantmen
 in territorial seas, 226-227
Washburn, In re, 494
Weedin v. Chin Bow, 155
Wells v. Williams, 724
West Rand Central Co. v. King. Text, 36-40;
 337, 338
 White, C. H., Case of, 229
Whitney v. Robertson. Text, 470-474; 42
 Whittington, W. V., 470
 Wildenhuis' Case. Text, 282-289
 Williams, B. H., 468
 Williams, Sir J. F., on confiscation of enemy
 property, 731-732; 754; on League as
 international person, 52
 Williston, S., 464
 Wilson, G. G.
 on admission of insurgency, 137-138; 639
 on neutralization, 66
 on suzerainty and Indian tribes, 74
 Wilson, Woodrow, on recognition, 99; Procla-
 mation of Neutrality, 857-863

- Wimbledon*, The S. S. Text, 269-277; 46, 328
- Wolff v. Oxholm*, 728, 729
- Woolsey, L. H.
 "Fallacies of Neutrality," 998-1000
 on *rebus sic stantibus*, 463n.
 on seizures outside three-mile limit, 229
- Woolsey, T. S., 662
- World Court. *See* Permanent Court of International Justice
- World War Debt Funding Commission, 469
- Wright, Q., 549, 701
 on Kellogg Pact and neutrality, 855-856
 on nonrecognition, Manchuria, 108-110
- Wright v. Henkel*, 533
- Wulfsohn v. R. S. F. S. R.*, 122
- Württemberg and Prussia v. Baden*, 60
- Yugoslavia, 56-58, 63
- Zabita, *In re*, 706
- Zamora*, The. Text, 884-890